Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for decision

Communications, Energy and Paperworkers Union of Canada,

complainant,

and

Intek Communications Inc.,

respondent.

Board Files: 28564-C, 28660-C, 28681-C, 28816-C, 29450-C
Neutral Citation: 2013 CIRB **683**
May 24, 2013

The Canada Industrial Relations Board (Board) was composed of Mr. Graham J. Clarke, Vice-Chairperson, and Messrs. André Lecavalier and Norman Rivard, Members. Hearings were held before the panel on December 12–14, 2011 and February 13, 2012. Owing to the incapacity of a panel member, the matter was reassigned to the Vice-Chairperson, sitting alone, pursuant to section 14(3) of the *Canada Labour Code (Part I Industrial Relations)* (*Code*). Further hearings were held on September 11–13, 2012; October 18, 2012; and December 3–6, 12, and 21, 2012.

Appearances

Mr. Jesse Kugler, for Communications, Energy and Paperworkers Union of Canada;

Mr. Kelsey Orth, for Intek Communications Inc.

I–Introduction

[1] This decision examines multiple unfair labour practice (ULP) complaints filed by the Communications, Energy and Paperworkers Union of Canada (CEP) against Intek Communications Inc. (Intek). Intek is a cable industry contractor whose sole client is Rogers Communications Inc. (Rogers).

[2] Intek's technicians visit Rogers customers' residences to provide various cable services and trouble shooting. This type of work servicing the cable industry falls within the Board's jurisdiction (*XL Digital Services Inc.* v. *Communications, Energy and Paperworkers Union of Canada*, 2011 FCA 179).

[3] The multiple complaints raised numerous issues. While the Board has decided to dismiss a number of the CEP's allegations, it has also concluded that Intek violated certain *Code* provisions, both before and after the CEP's certification.

[4] The CEP also satisfied the Board that Intek did not bargain in good faith at all times, despite the parties being able to agree on numerous provisions for a first collective agreement.

[5] The CEP suggested that binding arbitration constituted the only practical remedy for Intek's *Code* violations. The CEP argued that all the allegations it put forward in its multiple ULP complaints, including those prior to Intek having a duty to bargain under the *Code*, supported a binding arbitration remedy.

[6] Intek objected to this global approach and argued, for the bargaining complaint itself, that the Board could not consider any events which predated the existence of its duty to bargain under section 50(*a*) of the *Code*.

[7] For the reasons explained in this decision, the Board has concluded that the time period when events occurred impacts the remedies available under the *Code*. While the Board may hear a number of ULP complaints concurrently concerning events occurring both before and after certification, this manner of proceeding does not mean that all events are therefore relevant to the allegation of a violation of the duty to bargain in good faith.

[8] The Board has issued remedies for Intek's non-bargaining ULP violations. It has also issued an appropriate bargaining remedy designed to put the parties back in the position they would have been in if Intek had not violated the *Code* during negotiations.

II–The Complaints

[9] The CEP filed several complaints in 2011 and 2012. Those matters involved initially its organizing drive at Intek and then subsequently collective bargaining.

A–February 1, 2011 ULP (Mr. Ryan Burtch and unlawful employer communications complaint) File 28564-C

[10] The first ULP complaint concerned a key CEP organizer, Mr. Ryan Burtch, who works at Intek as an Inspector.

[11] Mr. Burtch, a former technician, required an accommodated position for medical reasons.

[12] The CEP alleged that Intek, for anti–union reasons, treated Mr. Burtch differently from other employees. For example, while he lived near Intek's Ajax office in Durham Region, Intek required Mr. Burtch to drive to its Markham office every day to collect his vehicle.

[13] Other contested events included a reporting requirement imposed during the CEP's organizing drive that obliged Mr. Burtch to advise Intek of his break and lunch times, as well as alleged unauthorized access into his company vehicle.

[14] The CEP also raised in its written pleadings an issue related to Mr. Burtch's benefit plan and a delay in coverage for his dependent.

[15] The ULP complaint also contested certain written communications Intek had sent directly to its employees about the CEP's organizing drive. The CEP suggested Intek's letters threatened job security and raised the possible loss of the Rogers contract.

[16] Besides requesting various remedies for Mr. Burtch, the CEP reserved the right to rely on its allegations in support of a future request for remedial certification (*Code* section 99.1).

B–March 16, 2011 ULP (Mr. Kelvin Kou, complaint #1) File 28660-C

[17] Mr. Kelvin Kou was another of the CEP's organizers. The issues concerning Mr. Kou included a fee Intek imposed to clean his vehicle; a decrease in his 2011 remuneration; a warning about a failure to meet performance standards; and a warning given for failing to complete a client call.

[18] The CEP asked, *inter alia*, that all discipline be removed from Mr. Kou's file.

C–April 1, 2011 ULP (Mr. Kelvin Kou, complaint #2) File 28681-C

[19] The CEP subsequently contested a three-day suspension imposed on Mr. Kou for the alleged inappropriate use of his laptop and asked, *inter alia*, that the discipline be rescinded.

[20] The first three complaints preceded the CEP's certification, which the Board granted on April 5, 2011. The CEP sent Intek a notice to bargain on April 11, 2011.

D–June 16, 2011 ULP (Duty to bargain in good faith complaint) File 28816-C

[21] This post-certification complaint alleged that Intek had failed to respect section 50(*a*) of the *Code*, which establishes the duty to bargain in good faith (Duty), including by refusing to produce relevant documents in a timely fashion, such as the Rogers contract.

[22] On August 25, 2011, the CEP filed further particulars which alleged Intek violated the *Code*'s statutory freeze in section 50(*b*) when it decreased payment for a particular code Intek's technicians used for compensation purposes.

[23] On November 3, 2011, the Board advised the parties it would hear the bargaining complaint first. On November 8, 2011, the CEP requested that all of its complaints be heard together. The CEP further appended a "Schedule A" to its letter with the first 62 paragraphs summarizing its original particulars, and adding a further 33 paragraphs of new particulars.

[24] Based on those particulars, the CEP requested as a remedy, *inter alia*, binding arbitration for a first collective agreement.

[25] The scope of the CEP's particulars obliged the Board to cancel the hearing it had scheduled for November 21–23, 2011.

[26] On February 21, 2012, the Board agreed to hear all of the CEP's complaints concurrently.

E–May 31, 2012 ULP (Written communications; Intek's meetings with employees) File 29450-C

[27] In May, 2012, the CEP filed another ULP complaint contesting Intek's further written communications to bargaining unit members and alleged "captive audience meetings".

[28] On June 18, 2012, the CEP provided further particulars regarding events which had taken place on June 14, 2012 including a letter Intek sent to bargaining unit employees on the eve of a strike and Intek's hiring of alleged "replacement workers", contrary to section 94(2.1) of the *Code*.

III–Chronology of events

[29] This chronology summarizes the events occurring in the multiple complaints. The dates of the events are relevant to some of the Board's conclusions, including on the topic of remedy.

A–August, 2010

[30] In or about August 2010, the CEP commenced its organizing drive at Intek.

B–September, 2010

1–CEP letters to Intek

[31] In accordance with its usual practice, the CEP sent Intek letters (Ex-17; Tab 28 and Ex-1; Tab 5) in September, 2010 identifying both Mr. Burtch and Mr. Kou, among others, as members of the Employee Organizing Committee.

2–CEP and Intek communications

[32] In September, 2010, Intek sent an initial written communication to its employees about the CEP's organizing drive (Ex-1; Tab 1). That communication listed certain "questions" about the CEP, and trade unions in general, to which Intek provided "answers". Intek opined that it believed its employees did not need a union, but that the choice was theirs alone.

[33] The CEP contested the lawfulness of this initial written communication including, *inter alia*, comments Intek wrote about union dues, support for political causes, job security and whether employees behind the organizing drive would receive any special treatment.

[34] The CEP contested Intek's failure to check the accuracy of its comments, such as the amount of dues it charges members.

[35] Shortly thereafter, the CEP responded in writing with a document entitled "The Straight Goods" (Ex-18; Tab 3).

3–Mr. Kou's Record of Action: messy vehicle

[36] On September 29, 2010, Intek provided Mr. Kou with a written warning (Ex-18; Tab 43) about his Intek truck being messy and using it as an ashtray.

C–October, 2010

1–Mr. Burtch's work assignment

[37] Subsequent to the CEP's September letters advising Intek of the organizing drive, Mr. Burtch discussed his current work assignment with his Intek manager. Mr. Burtch questioned the continuing requirement for him to drive to Markham to collect his vehicle, despite the fact that he lived very close to Intek's Durham Region office.

[38] Mr. Burtch learned from new schedules that his fellow inspector was doing inspections in Durham Region. Mr. Burtch argued he would have been able to perform those inspections without driving a long distance to collect his vehicle in Markham.

[39] Mr. Burtch alleged that his manager, Mr. Tim Patterson, justified the situation because of Mr. Burtch being a "bad boy". Mr. Patterson testified that it was Mr. Burtch who used the expression "bad boy" to explain his current travel schedule.

[40] Intek lead evidence that Mr. Burtch had been performing this same assignment prior to the CEP's organizing drive and that its two full-time inspectors, including Mr. Burtch, had always worked out of the Markham office.

D–November, 2010

1–Intek communication #2 to employees regarding the CEP

[41] On or about November 25, 2010, Intek wrote again to its employees (Ex-1; Tab 2) about the CEP's ongoing organizing drive and also responded to the CEP's document entitled "The Straight Goods". The CEP alleged that Intek's communication clearly drew a connection between unionization and reduced wages, benefits and job security.

E–December, 2010

1–Letter to Mr. Burtch regarding lunch and breaks

[42] On or about December 7, 2010, Intek wrote a letter (Ex-1; Tab 3) to Mr. Burtch advising him that he had approached a working Intek employee and discussed signing a union membership card. As a consequence, Intek's General Manager, Mr. Chris Wilkins, imposed a reporting mechanism on Mr. Burtch:

> This letter will confirm the discussion between you, me and Amanda Yeaman on November 17th regarding your participation with regard to the organization of the CEP union. Intek was advised that you recently approached a Simcoe technician asking him to sign a union card. You acknowledged that you did approach this individual but advised that you were on your break. This particular employee was not receptive and advised that this was during working hours and he was not on his break. As per our discussion, please ensure that when conversing with employees regarding union matters, they are on their break and their status is set to unavailable. Additionally, as per your discussion with Tim Patterson, you will be advising James Yeaman when you start and finish your breaks and lunches which he will document effective November 18th, 2010.
>
> Again, please accept this as written documentation of our discussion, and a guideline going forward.
>
> (Ex-1; Tab 3)

[43] Mr. Burtch was the only Intek employee required to advise management of his break and lunch times. This reporting requirement still remained in force when the Board's hearing ended in December, 2012.

2–Mr. Burtch's concerns regarding someone entering his vehicle

[44] Also in December, 2010, Mr. Burtch expressed concern to Intek management that someone was entering his Intek vehicle and looking at his CEP organizing material when he was absent doing his inspections.

3–Charge for cleaning of Mr. Kou's vehicle

[45] On December 21, 2010, Intek had Mr. Kou's vehicle cleaned and charged him $45.20 for this service (Ex-18; Tab 19). The CEP alleged that Intek's action targeted Mr. Kou due to his union activities. Mr. Kou testified he had cleaned his vehicle. In the CEP's submission, no other employee had ever been subject to this charge.

[46] Intek presented evidence that Mr. Kou had requested another vehicle. Since his current vehicle was dirty, Intek gave him the option of either cleaning it or paying to have Intek arrange it.

[47] Intek raised a previous experience in 2010 (Ex-18; Tab 45) when it had paid over $300.00 in repairs as a result of Mr. Kou's cigarette ashes entering his vehicle's instrument panel. This required Intek to replace the instrument cluster. No discipline or charge to Mr. Kou resulted from this 2010 incident, which predated the organizing drive.

F–End of 2010

[48] The CEP had issued another communiqué (Ex-18; Tab 4) to Intek workers entitled "Why we need CEP Representation at Intek". Intek suggested in its evidence that it was obliged to respond, particularly to comments made about Bell Canada employees that the CEP represented.

1–Intek communication #3 to employees

[49] At the end of 2010, or in early 2011, Intek sent its third written communication to its employees (Ex-1; Tab 4) in which it commented about Bell Canada, as well as about the auto sector. The CEP alleged that Intek's letter threatened employees' future job security via references, *inter alia*, to the contract with Rogers (Intek's sole client) and the auto sector.

[50] The CEP noted that many Intek employees lived in and around Oshawa where auto workers had been hit hard by recent economic events.

2–Mr. Kou's remuneration

[51] Another issue involving Mr. Kou concerned his annual income for 2010 and 2011. The CEP alleged that Mr. Kou suffered the largest income decrease of all the technicians and that Intek had engineered this decrease because of his union activities.

[52] Intek provided a table during its evidence suggesting that other comparably-situated technicians had also earned less in 2011 than in 2010.

G–February, 2011

[53] On February 25, 2011, the CEP filed its certification application with the Board.

H–March, 2011

1–Mr. Kou: record of action for performance metrics (March 8, 2011)

[54] On March 8, 2011, Intek issued Mr. Kou a Record of Action (written warning) (Ex-18; Tab 23) for alleged poor performance. Intek suggested that it had simply followed its regular practice with Mr. Kou and produced Records of Action it had given to other underperforming technicians. The CEP alleged there were key differences between Mr. Kou's treatment and that of other technicians.

[55] The CEP suggested the difference in treatment could only have arisen from Mr. Kou's ongoing union activities, including the CEP's filing of its certification application on February 25, 2011.

2–Mr. Kou: record of action for Rotary Road incident (March 8, 2011)

[56] Also on March 8, 2011, Intek issued Mr. Kou a Record of Action (written warning) (Ex-18; Tab 24) concerning a February 25, 2011 customer call at an address on Rotary Road in Scarborough, Ontario. Mr. Kou's supervisor, Mr. Adrian Hernandez, alleged that Mr. Kou failed to complete the call.

[57] Mr. Kou testified that, despite trying for 30 to 60 minutes, snow had prevented him from finding what is called a TAP, a device with which a customer's Rogers' service can be deactivated and reactivated. Mr. Kou emailed Dispatch about the problem. Mr. Kou alleged he later called his supervisor Mr. Hernandez and said he would proceed to his next call. Mr. Kou was paid based on piecework and his next call was nearby. Mr. Kou alleged Mr. Hernandez told him he did not need to return and he would do the call.

[58] Mr. Hernandez suggested Mr. Kou ought to have called him rather than email Dispatch. Mr. Hernandez further disputed that he had ever told Mr. Kou he could leave the customer's premises. Instead, he told Mr. Kou to wait for him to arrive. Mr. Hernandez testified that Mr. Kou could not have tried to find the TAP, since the snow around it had not been touched. Mr. Hernandez testified he found the customer at home whereas Mr. Kou had indicated the customer was not at home. Mr. Hernandez indicated he completed the call that Mr. Kou should have done.

3–Mr. Kou: three-day suspension for inappropriate use of laptop (March 29, 2011)

[59] On March 29, 2011, Intek imposed a three-day suspension (Ex-18; Tab 44) on Mr. Kou for alleged inappropriate use of his work laptop computer. Mr. Kou had returned his laptop to Intek and requested a replacement. Intek allegedly found a virus on the returned computer, as well as unauthorized programs. Intek also suggested Mr. Kou had made inappropriate visits to pornographic websites.

[60] Mr. Kou admitted that he had installed two different mapping programs on his laptop to assist him in finding customers' houses. He denied visiting any pornographic websites.

[61] The CEP called another Intek employee, Mr. Robert Bonke, to testify that he had asked for replacement laptops and surfed pornographic websites. Intek had never spoken to him about his use of the laptop or imposed any discipline.

I–April, 2011

1–Certification of the CEP

[62] On April 5, 2011, the Board certified the CEP to represent the following bargaining unit at Intek (Order No.: 10032-U):

> all employees of Intek Communications Inc., **excluding** managers, persons above the rank of manager, office and clerical personnel.

[63] The CEP's bargaining unit included Intek's supervisors.

2–CEP Notice to Bargain

[64] On April 11, 2011, the CEP sent Intek a Notice to Bargain. A week later, the CEP sent Intek a letter requesting specific documentation it required to formulate its bargaining proposals, including employee wage information and a copy of Intek's contract with Rogers:

1. A list of all bargaining unit employees which identifies job title or classification, rates of pay, seniority or service dates, addresses, telephone numbers, and email addresses.
2. A copy of all Company policies and procedures which impact or may impact employees
3. A copy of all benefit plans including any retirement system
4. A copy of the agreement between Rogers and Intek Communications Inc.
5. A list of all managerial and supervisory personnel and the Company structure
6. Contact information for the employer chief negotiator including email address.
7. A list of the employer bargaining committee
8. Copies of all employment contracts

(Ex-1; Tab 11)

J–May, 2011

[65] In May, 2011, Intek forwarded some of the requested documentation to the CEP.

K–June, 2011

1–CEP email requesting documentation

[66] On June 3, 2011, after reviewing the information Intek had provided, the CEP sent an email (Ex-6) repeating its request for certain information, including the Rogers contract.

[67] The CEP also advised Intek in the same June 3, 2011 email that it would be requesting conciliation prior to its first negotiating session in July, 2011.

L–July, 2011

1–Mr. Kou: written warning regarding vehicle (July 13, 2011)

[68] On July 13, 2011, Intek issued Mr. Kou a written warning (Ex-18; Tab 47) for violating its vehicle policy. Mr. Kou had parked his Intek vehicle for the evening at a friend's house after work. He later returned home at around 12:00 a.m.

[69] Mr. Kou, as well as Mr. Bonke, testified that Intek allowed technicians to stop on the way home from work, as long as they did not deviate substantially from a direct route home.

[70] In Mr. Bonke's case, he mentioned he sometimes shopped for groceries on his way home after work.

2–Mr. Kou: removal of vehicle privileges (July 19, 2011)

[71] On July 19, 2011, Intek gave Mr. Kou another letter (Ex-18; Tab 51) alleging a violation of Intek's vehicle policy. Intek alleged Mr. Kou had used his company vehicle on his day off. As a result, Intek took away Mr. Kou's privilege to take his vehicle home. He would be required to pick it up each day from the Markham office prior to starting his customer calls.

[72] Intek alleged it learned of Mr. Kou's off-duty use of the vehicle when a bank manager complained to Rogers about Intek employees using reserved bank parking spots when they went to lunch. Despite the bank manager complaining to Rogers, and Intek receiving notice from Rogers, no employees, other than Mr. Kou, were disciplined.

[73] Mr. Kou testified that he had been servicing customers on his day off. Intek technicians sometimes did "repeats" on their own time to avoid a negative impact on their performance metrics. He indicated that he had spoken to his supervisor Mr. Sean Hossein about his plans.

[74] Mr. Kou further testified that he later asked his manager, Mr. Jeff Anthony, why he was being singled out for discipline. Mr. Anthony allegedly replied it was due to Mr. Kou changing the "whole Intek world because you brought in the union" and "if you don't like Intek why not move to another company".

[75] The CEP argued that Intek failed to address Mr. Kou's allegation about these comments when Mr. Anthony testified.

3–July 20–22, 2011: first Intek-CEP bargaining session

[76] Intek and the CEP commenced collective bargaining in late July, 2011. One of the specific issues about which the Board heard evidence was Intek's proposal seeking to exclude supervisors from the existing bargaining unit. The Board's original bargaining unit description had included supervisors.

M–August, 2011

1–Mr. Kou: verbal warning (August 4, 2011)

[77] On August 4, 2011, Intek issued a verbal warning (Ex-18; Tab 53) to Mr. Kou alleging that he had not been following Intek's policy requiring all employees to speak English in its warehouse. Intek insists on warehouse employees using a common work language given the many languages employees speak.

[78] Mr. Kou explained that he could not prevent others from speaking to him in Chinese (Ex-23 and Ex-29).

[79] Intek did not discipline any other employees involved in the warehouse incident.

2–Change to certain work codes

[80] On August 22, 2011, Intek issued memoranda (Ex-2; Tabs 10 and 12) to its technicians regarding a change to certain work codes. Intek provided a further clarification memo on August 25, 2011 (Ex-2; Tab 11). The CEP alleged this change violated the statutory freeze. Intek alleged it was attempting to standardize a coding practice which was not uniform in its three operating regions:

> **MEMO**
>
> **To:** ALL TECHNICIANS
>
> **Date:** August 25th 2011
>
> **Re:** CLARIFICATION WITH REGARDS TO CODING 692 WITH 252/253
>
> ---
>
> As per the long description in effect since June 2009, task code 692 is never to be used with codes 252 (CONN) or 253 (RECN). However effective immediately if you are in a situation where you must run an excessive ground (excessive = greater than 10 feet) on a CONN or RECN order, the following steps apply:
>
> 1. Contact your supervisor for approval
>
> 2. Close the order with proper comments for the ground: Ie : "NEW CONN, 656=RUN GRND > 15' TO WATER PIPE – NONE BEFORE" or "RECN, 656=RUN GRND > 10' TO HYDRO STACK TO ROGERS SPEC"
>
> 3. Internally we will monitor the usage and then send a list to Rogers for approval. **We will be looking at orders that have "656" in the comments so ensure that you are following the above examples.** Once the order has been approved WOC will add code 656 to each applicable order. 656 pays $4.00.
>
> PLEASE BE ADVISED THAT WHEN CHANGES WERE MADE TO THE LONG DESCRIPTION FOR 692 IN 2009, THE CHANGES WERE COMMUNICATED TO ALL REGIONS.
>
> **Remember** - this new process is only for running grounds GREATER than 10 feet with a 252 (CONN) or 253 (RECN) order. You must follow the current rule as per the long description and include the **LENGHT**, **REASON** and **LOCATION** the ground was run to. Failure to include these comments will result in the 656 not being paid.

(emphasis in original)

N–September, 2011

1–Collective bargaining

[81] The parties conducted further negotiations on September 14–15, 2011.

2–September, 2011 departmental meeting

[82] The CEP was preparing to hold a strike vote on or about October 6, 2011. The Board heard evidence that Intek, at regularly scheduled September, 2011 departmental meetings, discussed not only regular business matters, but also commented about the strike vote and collective bargaining.

[83] Technicians were paid when they attended these compulsory departmental meetings. These multiple meetings took place in various geographic locales where employees worked.

[84] Intek's Minutes for these meetings were introduced into evidence. The Board also heard *viva voce* evidence from employees who attended, as well as from Intek managers, about comments made at these meetings.

[85] For example, on or about September 29, 2011, Intek's General Manager, Mr. Wilkins, discussed bargaining matters with employees as set out in the Minutes (Ex-10 and Ex-11). Mr. Wilkins' recollection of his comments lacked any useful detail, but he did not deny the accuracy of Intek's Minutes.

[86] Among other comments, the evidence, as well as Intek's Minutes, demonstrated that Mr. Wilkins talked about:

i) the CEP allegedly asking for a $300.00 daily minimum;
ii) employees having permission to use their Intek vehicles to attend the CEP's upcoming strike vote;
iii) where employees could obtain information concerning decertification;
iv) negotiations breaking off despite Intek putting forward a "very appropriate proposal";
v) improvements Intek had offered but which "were not taken into consideration" by the union; and
vi) Intek's willingness to agree to a daily minimum but that "the offer from the union was far too high to be operational".

O–October, 2011

1–CEP strike vote

[87] On or about October 6, 2011, the CEP took a strike vote as required by section 87.3 of the *Code*. The CEP ultimately did not act on this initial strike vote within the *Code*'s 60-day window.

2–Mr. Wilkins' meeting with certain bargaining unit members

[88] The day after the CEP's strike vote, three senior Intek technicians, led by Mr. Bill Li, met with Mr. Wilkins. Mr. Li indicated he had been asked to attend. Intek suggested Mr. Li had requested the meeting.

[89] Regardless of who asked for the meeting, discussions took place regarding negotiations. Mr. Li brought a handwritten list (Ex-2 Tab 15) of items that the technicians wanted in any agreement. Those items included a daily minimum of $150.00 and payment amounts for certain piecework codes.

[90] Mr. Wilkins indicated at the meeting he had concerns about "crossing the line". They discussed the items on Mr. Li's list for about 40 minutes. An additional item was added to Mr. Li's list during the course of the meeting.

[91] Mr. Li left the list with Mr. Wilkins.

P–November, 2011

[92] During the hearing, the CEP called evidence about various Intek bargaining positions which allegedly violated the Duty.

1–Bargaining issue: supervisors in the bargaining unit

[93] The parties negotiated on November 14–15, 2011.

[94] Intek had earlier proposed on several occasions that supervisors be removed from the bargaining unit. While the CEP had refused this request several times, the parties did arrive at a Letter of Understanding on the issue. The CEP agreed not to contest any future application Intek made to the Board requesting that the description of the bargaining unit be amended to exclude supervisors (CEP Proposal U-7 dated January 10, 2012).

2–Bargaining issue: unilateral right to change compensation

[95] The CEP contested Intek's attempt to reserve the right to change employees' compensation during the term of the collective agreement.

[96] For example, Intek's opening wage proposal (Ex-1; Tab 23) in the introductory paragraphs of Appendix A "Job Classifications and Wage Rates", read:

> APPENDIX "A"
>
> JOB CLASSIFICATIONS and WAGE RATES
>
> PIECE RATES FOR PIECE WORK TECHNICIANS AND PIECE WORK TECHNICIANS (COMMERCIAL)
>
> Effective on the date of ratification and for the duration of this Agreement the piece work rates shown on Appendix "C" attached shall apply.
>
> **It is expressly understood that the Employer reserves the right to implement reductions, charge backs or and reversals to piece work rates or earnings and to make changes to Appendix "C" in order to respond to business and customer requirements.**
>
> (emphasis added)

[97] The above reference to "customer requirements" refers to Rogers, Intek's sole customer. The reference to Appendix C refers to a list of the piecework codes that Intek technicians use. Employees are paid on a piecework basis, meaning that they receive a specific payment based on each code they complete during their workday.

Q–December, 2011

1–CIRB hearing commences

[98] The Board commenced its hearing on December 12, 2011.

2–CEP response to Intek bargaining proposal

[99] In a December 16, 2011 email, the CEP set out, *inter alia*, its objection to Intek's Appendix A proposal reserving Intek's right to modify compensation unilaterally during the term of the collective agreement.

R–January, 2012

1–Further negotiations

[100] The parties negotiated from January 9–11, 2012.

2–Bargaining issue: unilateral right to change remuneration

[101] The Board heard evidence on several occasions about Intek's reserve of a unilateral right to modify remuneration, particularly during Mr. Wilkins' cross-examination. Intek did change its original position regarding the right to modify the rates payable for the codes.

[102] For example, it agreed in Appendix B (Ex-17; Tab 10) of its May 17, 2012 proposal that piecework rates could only be modified if both parties agreed. Intek had similarly agreed that third party arbitration would decide the wage rate for a new classification, if the parties could not agree themselves (Ex-17; Tab 10; section 11.01(b)).

[103] But the CEP still had concerns with Intek's right unilaterally to modify the content of the codes, as reserved in its proposed section 5.01(f) in its management rights clause (C-7 Ex-17; Tab 6; C-8 Ex-17; Tab 10):

> 5.01 The Union recognizes and acknowledges that the management of the operations and direction of the working force are fixed exclusively in the Employer and, without restricting the generality of the foregoing, the Union acknowledges that it is the exclusive function of the Employer to:
>
> ...
>
> (f) introduce new or improved methods or facilities, extend, limit, curtail, or cease operations or any part thereof; allocate and assign work, determine the content of jobs, introduce new jobs and the rates to be paid with respect to them during a contract term, **to determine codes and to add, introduce, remove, or alter codes and to amend the description of codes from time to time**; determine the qualifications required by an employee to perform any job, determine the number of employees required to perform any job or function, assign employees to a job or shift, and rearrange jobs, functions and shift schedules for any business purpose;
>
> (emphasis added)

[104] The CEP also contested the text of Intek's proposed Letter of Understanding, which reserved the right to add chargebacks during the term of the collective agreement (Ex-17; Tab 6):

> The parties recognize that the industry practice used by the client(s) is to give a monthly penalty to the Employer if they fail to meet contractually agreed to standards.
>
> Intek agrees that it shall maintain this practice provided the following standards are maintained:
>
> a) Inspections must remain above 85%
> b) Repeats for Installs shall remain below 6%
> c) Repeats for Service Calls remain below 9%
>
> In the event that performance standards fall below the thresholds as set out above INTEK reserves the right to implement chargebacks on the same basis as the industry practice.

[105] The Letter of Understanding regarding chargebacks specifically references "industry practice". The Board understands that a client like Rogers may impose penalties, called chargebacks, on a contractor which fails to meet certain performance metrics.

[106] Intek also had a policy allowing employees to take their company vehicles home. The CEP did not dispute Intek's right to cancel the policy, but did contest its unilateral right to change the vehicle fee employees paid: "The Employer reserves the right to change the fee from time to time" (Ex-17; Tab 14 Appendix B).

3–Bargaining issue: contracting out

[107] Another issue separating the parties concerned contracting out. Intek rejected the CEP's concept of a limitation on contracting out, including various drafting formulations designed to address any concerns.

[108] Despite the CEP suggesting different wording on this issue, Intek never made a counter proposal for contracting out.

4–Bargaining issue: term

[109] In early negotiations, Intek had proposed both a 12-month and 24-month term for the collective agreement. As negotiations progressed, the CEP and Intek agreed on a 2-year term.

[110] For example, Intek's January 9, 2012 proposal (C-6) suggested a period of 24 months (Ex-17; Tab 4). The CEP's January 10, 2012 (U-6) response agreed and inserted dates of December 1, 2011 to November 30, 2013 (Ex-17; Tab 5).

[111] Intek would later propose a one-year term (Ex-20) after the CEP's strike commenced.

5–Bargaining issue: daily minimum

[112] Another proposal separating the parties concerned a daily minimum. The CEP had requested that the technicians receive a daily guarantee, given the piecework nature of their employment. In the CEP's initial July, 2011 offer (Ex-1; Tab 16) it had proposed a $220.00 daily minimum effective April 5, 2011 and a $240.00 daily minimum effective April 5, 2012.

[113] The daily minimum would include payment for all the piecework codes technicians had performed that day.

[114] Intek had made a conditional offer of a daily minimum in its January 9, 2012 proposal (Ex-17; Tab 4), but only if the CEP accepted Intek's proposed language on seniority:

> **Daily Minimums**
>
> **Conditional on the Union agreeing to the Company Seniority language the Company is prepared to offer the following:**
>
> A daily minimum shall be established for hours worked based on an employee working 10 hour shifts. Should any different hours of work be established the parties agree to the pro-rating of the above daily minimums. The above daily minimums shall also be pro-rated should an employee not complete their shift for any reason, or asks to finish sooner than the end of their shift.
>
> The Employer agrees that the employee pay period earnings shall be at least equal to the daily minimum multiplied by the number of days in the pay period. These minimums shall be used for the calculation of earnings for jury duty, bereavement leave, and overtime.
>
> The Daily Minimums (Piece Workers, except for Apprentice Technicians) shall be as follows:

Effective on Ratification	Effective Year 2
$105.00	$107.00

(emphasis in original)

[115] Intek withdrew its daily minimum proposal on January 10, 2012 after the CEP counter-offered on the seniority language. The CEP suggested Intek's daily minimum offer amounted to paying the statutory minimum wage. It also argued Intek had never offered an unconditional daily minimum of any amount, despite what it had told its employees at departmental meetings.

6–Bargaining issue: late proposals

[116] The CEP also contested Intek's alleged late proposals. In early 2012, Intek engaged a new chief negotiator when its original negotiator left for another work opportunity. In January, 2012, Intek then made a first-time proposal for part-time employees (Ex-17; Tab 4).

[117] Despite the lateness of this proposal, the parties exchanged language in subsequent bargaining sessions.

S–April, 2012

1–New strike vote

[118] In late April, 2012, the CEP conducted another strike vote.

2–Intek communication #4 to employees

[119] In advance of the CEP's strike vote, Intek sent another letter (Ex-17; Tab 9) to all its employees. That letter again gave employees permission to use their Intek vehicle to attend the CEP's strike vote and, *inter alia*, recommended that employees ask the CEP for answers to various questions:

> When you attend the meeting it is important to ask questions and get all of the necessary information for you to make an informed decision. You may want to ask why the Union is seeking a strike mandate given the Company's willingness to hold further negotiations? What terms and conditions that you currently enjoy, such as pay and benefits, if any, will continue in the event of a strike, and [*sic*] are eligible for Unemployment Insurance benefits in the event of a strike? How long will a work interruption last? Is there any guarantee that the Union will achieve its objectives in the event of a strike? If we vote in favour of a strike will have any say on when and if an actual strike may occur?

T–May, 2012

1–May 2012 collective bargaining

[120] The parties met to negotiate on May 17, 2012. Intek provided a detailed updated proposal for a two-year agreement including a 1.5% increase to the piecework codes for each year of the agreement (Ex-17; Tab 10).

2–Intek departmental meetings and comments on bargaining

[121] Between May 22–25, 2012, just as had occurred prior to the CEP's strike vote in the Fall of 2011, Mr. Wilkins again discussed bargaining matters directly with employees at compulsory departmental meetings. Employees were again paid to attend these meetings.

[122] Mr. Wilkins commented on various issues, as confirmed by the oral evidence and the Minutes from those various meetings (Ex-17; Tabs 19–22), including:

i) that he had a greater ability to comment if employees asked him questions ("Our hands are tied with how much we can say, but ask questions and we'll be as open as we can be about keeping you informed");
ii) that some of the CEP's proposals did not make sense both for the technicians and Intek ("the wages that are being proposed do not make sense for the techs…");
iii) that an official Intek letter would be coming and that techs were free to continue working in the event of a strike;
iv) that there were plans in the works to improve things (Q: "Aside the union, is there a plan on Intek's end for improvement if it doesn't go through? A: "hands are tied on what we can say, but when it comes down to it we have to get better as a company. There are things in the works in terms of getting better as a company".); and
v) that for concerns an employee in Midland had raised about "slow work" that things would change ("I can't say too much-but we would be crazy not to look at changing things").

[123] Mr. Wilkins also told employees that they would be hiring individuals, including ex-employees, in order to continue operating during any strike.

3–Intek written communication #5 regarding tools and equipment

[124] On May 25, 2012, Intek sent its employees a letter (Ex-17; Tab 11) about the potential June 15, 2012 strike. Intek asked employees to advise their managers by June 4, 2012 if they intended to work during the strike. For those who did not intend to work, the letter advised them of their obligation to return Intek's tools and equipment after their final shift:

> The latest bargaining session with the CEP has concluded and much to Intek's disappointment a Collective Agreement has not yet been reached. As we have received notice of a possible work stoppage June 15th, we wanted to take this opportunity to inform you of Intek's intentions should this occur.

> Please be advised, should the CEP call for a work stoppage at Intek, **company operations will continue** for all those who choose continuing to work instead of going on strike. New systems and procedures will be implemented to ensure that technicians will be able to continue providing service to our customer without having to come to the warehouse for any reason.
>
> If it is your wish to continue working, please contact your manager (not your supervisor) by **June 4th, 2012**...
>
> ...
>
> Employees who decide that they will participate in the work stoppage will be required to return **all** company and customer owned tools and equipment upon completion of their final shift immediately prior to the announced work stoppage date.
>
> ...

(Ex-17; Tab 11; emphasis in original)

U–June, 2012

1–Intek written communication #6

[125] On June 14, 2012, Intek issued another letter (Ex-17; Tab 13) to its employees on the eve of the CEP's strike. That letter commented on the news that two other Rogers contractors and the CEP had recently entered into tentative collective agreements.

[126] Intek suggested the types of questions that employees should ask the CEP about those collective agreements, which Intek had not yet seen:

> ... These tentative agreements are not in force until they are ratified by the membership. We urge you to ask questions and get the details of whether these agreements are favourable or unfavorable, and whether the meaningful issues have been addressed in a positive fashion. You will likely hear a lot of rumour and innuendo in the next few days. It is important to remember that a collective agreement can have improvements, but equally, they can have concessions, or, there may not be any improvements to terms and conditions of employment. You may want to ask about some of the issues that have been raised by the Union in past communications, such as:
>
> 1) The application of seniority versus merit in the assignment of work
> 2) Will all employees receive increases during the term of the agreement, and
> 3) Will chargebacks be applied in the event of poor workmanship or performance.

[127] Intek's letter further confirmed its intention to remain open during any strike:

> ... We confirm that it is our intention to continue to operate in the event of a strike. It is in our interests to protect our business to the best of our ability, as all of us, including management rely on our customers to support us and ensure that we can remain a viable business. The economic consequences of a strike can be devastating to everyone and we will do our best to ensure that we can continue to operate as effectively and efficiently as possible. We do not want any of our employees to engage in strike action, but that right is yours and the decision is yours to make. We hope that you will seek out all of the answers before deciding whether strike action is warranted and we know that you will make the right choice.

2–CEP request to negotiate

[128] The CEP requested that Intek meet to continue negotiations. Intek advised the Conciliator on June 10, 2012 it could not meet.

3–Strike at Intek

[129] The CEP's strike commenced on June 15, 2012. The CEP still remained on strike at the conclusion of the Board's hearing in December, 2012.

4–Intek's hiring of new employees

[130] Intek had hired new employees, including former employees, both before and after the strike. Intek's overall hiring of employees in 2012 was lower than it had been in 2011 (Ex-18; Tab 61).

V–July, 2012

1–New CEP proposal and request to bargain

[131] On or about July, 16, 2012, the CEP sent the Conciliator an amended collective agreement proposal and requested that bargaining resume. Intek refused to meet and suggested that the CEP had gone backwards in its proposal.

[132] The CEP argued its proposal had made substantive concessions on items such as contracting out and work of the bargaining unit, in addition to agreeing to several of Intek's previous proposals.

W–August, 2012

1–CEP request to bargain

[133] On August 20, 2012, the CEP wrote again to Intek (Ex-17; Tab 16) and requested that bargaining resume:

> Prior to the commencement of the strike and subsequent thereto, the CEP has made numerous attempts to meet with Intek in an effort to resume collective bargaining and conclude a collective agreement. These attempts have included communications made directly to you and communications

made to you through Mr. MacDonell. Despite our attempts, Intek has consistently refused to meet and resume collective bargaining. In an effort to justify its refusal, **Intek has suggested that the CEP's latest proposal (U8) contains proposals that go "backwards". You have made this statement but have refused to meet with the CEP to explain your position in this regard. Intek's refusal to resume collective bargaining without any attempt to explain its position has completely frustrated the parties' efforts to conclude a collective agreement.**

We are writing to once again to [*sic*] **request that you return to the bargaining table.** If we do not hear from you by August 22, 2012, we will assume that Intek continues to refuse to return to the bargaining table. We hope that good faith efforts will be made to avoid that outcome.

(emphasis added)

[134] On August 21, 2012, Intek proposed new bargaining dates of September 27 or October 2, 4 and 11, 2012 (Ex-17; Tab 17).

X–October, 2012

1–October 2012 bargaining

[135] The parties met to negotiate on October 4, 2012.

2–Bargaining issue: term

[136] With a strike ongoing, Intek offered a one-year term for any agreement (Ex-20), rather than the two-year term which had been contained in several previously exchanged offers.

[137] The parties made no progress.

Y–November, 2012

1–Bargaining

[138] The parties met to negotiate on November 5, 2012.

[139] Intek proposed a "framework for settlement" (Ex-25) in which it indicated areas where it had flexibility compared with those where it did not. Those areas Intek considered "critical" and where little or no flexibility existed were: i) term of the agreement; ii) benefit cost sharing; iii) codes for technicians; and iv) chargebacks.

[140] Intek suggested it had flexibility, *inter alia*, for areas such as bargaining unit work; contracting out language; minimum rates of pay and part-time employees.

[141] Intek advised the CEP that if it accepted Intek's proposals for the critical areas, then it would discuss the other areas for which it had flexibility.

[142] The parties had not met again to bargain by the conclusion of the Board's hearing in December, 2012.

Z–December 2012 – January 2013

[143] The Board concluded its oral hearing, including final argument, on December 22, 2012. The parties subsequently provided a list of outstanding bargaining items, the last of which the Board received on January 22, 2013.

[144] The Board advised the parties that, exceptionally, this decision covering a multitude of complaints would not be issued within the usual 90-day time frame (*Code* section 14.2(2)) and that an extension had been obtained.

[145] The Board further reminded the parties that they remained subject to the *Code*'s Duty.

IV–Issues

[146] The CEP's complaints raise various issues which require resolution:

1. Did Intek violate the statutory freeze (section 50(*b*))?
2. Did Intek use replacement workers contrary to section 94(2.1)?
3. Did Intek's various communications with its employees violate section 94(1)(*a*)?
4. Did Intek violate section 94(3)(*a*) in its dealings with Mr. Burtch and Mr. Kou?
5. Did Intek violate the Duty (section 50(*a*))?

V–Analysis and decisions

A–Introduction

1–The chronology for the ULP complaints

[147] The Board had to keep in mind during its deliberations the chronological context of the CEP's multiple complaints.

[148] Even though the Board agreed to the CEP's request to hear all the evidence concurrently, that decision did not signify that all the evidence was necessarily relevant to every allegation.

[149] The *Code* at times creates remedies specific to the *Code* violation. For example, section 99(1)(*b.1*) is a specific remedial provision for the violation of the Duty in section 50(*a*), *infra*. It is not a general remedial provision that the Board can apply for any *Code* violation.

[150] Similarly, the *Code* specifies when a legal obligation arises. For example, the Duty in section 50(*a*) commenced when the CEP sent its notice to bargain. The statutory freeze in section 50(*b*) also started on that date. The *Code* also dictated when that freeze ended.

[151] Since Parliament has created remedies for the violations of specific *Code* sections, the Board has to be mindful of this fact when faced with a multitude of alleged *Code* violations. Treating all allegations globally, without regard to when various legal duties arise, or to the remedies available depending on the specific *Code* violation, would ignore the *Code*'s structure.

2–Burden of proof

[152] For issues such as whether Intek violated the Duty or interfered in the CEP's representation rights, the CEP bears the burden of proof. In this case, the CEP lead its evidence for all complaints first, but the parties were aware how the burden of proof would vary depending on the allegations.

[153] For those issues where the *Code* reversed the burden onto Intek (section 98(4)), a topic which will be reviewed in more detail *infra*, it had the obligation to convince the Board that its actions were not motivated by anti-union animus.

B–Decisions

1–Did Intek violate the statutory freeze (section 50(*b*))?

[154] The CEP argued that Intek violated the *Code*'s statutory freeze in section 50(*b*) when it issued three memoranda in August, 2011 about the use of code 692:

> 50. Where notice to bargain collectively has been given under this Part,
>
> ...
>
> (*b*) the employer shall not alter the rates of pay or any other term or condition of employment or any right or privilege of the employees in the bargaining unit, or any right or privilege of the bargaining agent, until the requirements of paragraphs 89(1)(*a*) to (*d*) have been met, unless the bargaining agent consents to the alteration of such a term or condition, or such a right or privilege.

[155] The Board heard evidence that Intek's workforce had been using code 692 differently depending on the region. The August, 2011 memoranda concerning code 692 were designed to standardize its use which dated apparently from 2009.

[156] Mr. Burtch testified that an employee might receive less remuneration than before because of this change. However, Intek suggested the outcome would be neutral, since some codes can be used multiple times. Intek also suggested it needed uniformity in its workforce's use of codes.

[157] The Board was satisfied that this change fell within the "business as before" principle the Board applies in statutory freeze cases. An employer may still manage its business in the normal course, despite the *Code*'s imposition of a freeze. This includes correcting discrepancies in work practices among different regions.

[158] The Board dismisses the CEP's allegation that Intek's August, 2011 memoranda concerning the use of code 692 violated the freeze.

2–Did Intek use replacement workers contrary to section 94(2.1) of the *Code*?

[159] The margin note in the *Code* for section 94(2.1) uses the expression "replacement worker". The CEP argued that Intek violated section 94(2.1) of the *Code* by using "replacement workers":

> 94.(2.1) No employer or person acting on behalf of an employer shall use, **for the demonstrated purpose of undermining a trade union's representational capacity rather than the pursuit of legitimate bargaining objectives**, the services of a person who was not an employee in the

bargaining unit on the date on which notice to bargain collectively was given and was hired or assigned after that date to perform all or part of the duties of an employee in the bargaining unit on strike or locked out.

(emphasis added)

[160] The *Code* at section 99(1)(*b.3*) describes the remedy the Board may issue for a violation of section 94(2.1):

99.(1) Where, under section 98, the Board determines that a party to a complaint has contravened or failed to comply with subsection 24(4) or 34(6), section 37, 47.3, 50 or 69, subsection 87.5(1) or (2), section 87.6, subsection 87.7(2) **or section 94**, 95 or 96, the Board may, by order, require the party to comply with or cease contravening that subsection or section and may

...

(*b.3*) **in respect of a failure to comply with subsection 94(2.1), by order, require the employer to stop using, for the duration of the dispute, the services of any person who was not an employee in the bargaining unit on the date on which notice to bargain collectively was given** and was hired or assigned after that date to perform all or part of the duties of employees in the bargaining unit on strike or locked out.

(emphasis added)

[161] In a report entitled *Seeking a Balance: Canada Labour Code, Part I, Review* (Ottawa: Human Resources Development Canada, 1995) (Sims Report), which reviewed Part I of the *Code* in the mid-1990's, the Task Force examined whether to ban replacement workers in the federal jurisdiction:

We have heard accounts of disputes where employers have used or planned for the use of replacement workers. **In some of these disputes, it appears to us that the employer was pursuing goals beyond the economic position they wished to achieve and had been sustaining the dispute, using replacement workers, solely to achieve a non-union workplace**. Such intentions can be inferred from reports of unfair labour practice complaints and from first-hand accounts of the disputes themselves. Indeed, some employers have virtually said as much during the disputes in question. It is unquestionably demoralizing for employees to see the threat of permanent loss of their jobs, not because they will not accept the employer's economic terms, but because they insist on their legal right to retain union representation.

Replacement workers can be necessary to sustain the economic viability of an enterprise in the face of a harsh economic climate and unacceptable union demands. It is important in a system of free collective bargaining that employers maintain that option, unrestrained by any blanket prohibition. If this option is removed, employers will begin to structure themselves to reduce their reliance on their permanent workforces for fear of vulnerability, to the detriment of both workers and employers alike.

It is only in exceptional circumstances that replacement workers are used for an inappropriate end. The strike or lockout ceases to be an economic interest dispute, and instead becomes a representation dispute. The majority support system of certification and decertification was designed to avoid representation disputes. Such disputes threaten the underpinnings of the system.

But how does one tell when a strike or lockout changes from a legitimate economic dispute to a dispute over the employee's right to be represented by a union and where replacement workers are being used for that purpose? There is no clear test that can be applied.

The union's rights are rooted in its majority support amongst the employees. We think that it is legitimate, before a strike is taken, to ensure that the employees' support for such a move is tested. That is why we have recommended that a strike vote be held in relatively close proximity to the start of any strike initiated by the union.

Once the strike or lockout commences, we believe that it should be fought out on the bargaining issues, not on the question of representation. Replacement workers should only be prohibited where they are used for an illegitimate end. Our recommendation can achieve this while preserving the basic balance of collective bargaining.

RECOMMENDATIONS:

There should be no general prohibition on the use of replacement workers.

Where the use of replacement workers in a dispute is demonstrated to be for the purpose of undermining the union's representative capacity rather than the pursuit of legitimate bargaining objectives, this should be declared an unfair labour practice.

In the event of a finding of such an unfair labour practice, the Board should be given the specific remedial power to prohibit the further use of replacement workers in the dispute.

(pages 130–131; emphasis added)

[162] The text of sections 94(2.1) and 99(1)(*b.3*) give rise to the following observations:

1. A replacement worker is someone who was not in the bargaining unit on the date when notice to bargain was given;
2. Employers are generally entitled to use individuals during a strike or lockout to perform bargaining unit work;
3. The *Code*'s focus is on activities during an actual strike or lockout, not on the preparatory steps being taken in advance of a dispute (see TELUS Communications Inc., 2004 CIRB 271 (Telus 271), at paragraph 110, varied on other grounds, TELUS Communications inc., 2005 CIRB 317);
4. The employer's intent when using individuals to perform bargaining unit work must be to put legitimate bargaining pressure on a trade union, comparable to that which a trade union's strike is intended to put on an employer;
5. Where an employer's intent changes from legitimate bargaining pressure to undermining the bargaining agent's representational capacity, then the Board may intervene and order the employer to cease using replacement workers during the strike or lockout; and
6. The trade union bears the burden of proof for demonstrating that an employer's use of replacement workers was designed to undermine its representational capacity.

[163] The CEP in its written argument stated it had met its burden for an order prohibiting Intek from using replacement workers:

> 207. Applying the above, it is submitted that Intek violate the Code by using replacement workers for the demonstrated purpose of undermining the CEP's representation capacity. There is clear and obvious nexus between the employer's bad faith bargaining and the use of replacement workers. The use of replacement workers, including the threatened use of replacement workers, has was a critical element of Intek's strategy to weaken CEP's position during bargaining and during the strike. The use of replacement workers in the instant circumstances was designed to erode support in the bargaining unit for the CEP's strike thereby undermining its position at the collective bargaining table. Intek's disclosure of its use of replacement workers to members of the bargaining unit was gratuitous and was not grounded in any overarching business objective. Simply put, it was intended undermine the CEP's representational capacity in contravention of the *Code*.
>
> 208. With respect to identifying the requisite unlawful intention on the part of Intek, reference to the numerous other unfair labour practices it has committed provides a sufficient basis on which the Board may infer "anti-union animus."
>
> [*sic*]

[164] The evidence demonstrated that Intek constantly hires new employees, given the significant turnover in this industry. The statistics presented demonstrated that Intek had hired less than half the number of new employees in the strike year of 2012 compared to 2011 (Ex-18; Tab 61). Intek's contacting of ex-employees and others prior to the CEP's June 15, 2012 strike is seemingly not the type of conduct covered by section 94(2.1), *supra*.

[165] Were these new employees hired for the demonstrated purpose of undermining the CEP's representational capacity?

[166] The Sims Report suggested that such an intent may be inferred from conduct, including employer unfair labour practices, which demonstrate a wish to rid the workplace of a union. The Board will consider whether Intek's other *Code* violations give rise to such an inference regarding its hiring of employees for the 2012 strike.

[167] As noted in the Introduction, the CEP has succeeded on some, but not all, of its allegations that Intek has breached certain *Code* provisions, *infra*. The Board must consider these other *Code* breaches in determining whether collective bargaining has degenerated into the type of representational dispute which section 94(2.1) is intended to address. But the existence of other *Code* violations, while relevant, does not end the Board's analysis.

[168] For example, a party may violate the Duty in a misguided hope to obtain an even more favourable collective agreement. The Sims Report, when considering the issue of replacement workers, referred to situations before the CLRB where an employer demonstrated no intention of entering into a collective agreement, but instead sought to destroy the certified trade union.

[169] The Board had concluded that Intek's *Code* violations did not transform this case into a representational dispute. The Board is satisfied that Intek used individuals to fulfill its contract with Rogers. Their use was also designed to put increased pressure on the CEP at negotiations.

[170] Subject to certain troubling Intek proposals and actions on which the Board will comment, *infra*, the overall progress the parties made does not suggest their collective bargaining has become a representational dispute. It is not the exceptional type of situation foreseen by the *Code*.

[171] The Board dismisses the CEP's allegation that Intek used replacement workers contrary to section 94(2.1)

3–Did Intek's various communications with its employees violate section 94(1)(*a*)?

[172] Section 94(1)(*a*) of the *Code* prohibits interference in the administration of a trade union and the related representation of employees:

> 94.(1) No employer or person acting on behalf of an employer shall
>
> *(a)* participate in or interfere with the formation or administration of a trade union or the representation of employees by a trade union.

[173] The CEP bears the burden of proof for a violation of section 94(1)(*a*). However, it does not need to demonstrate that Intek acted with anti-union animus.

[174] In the 1999 *Code* amendments, Parliament added section 94(2)(*c*) to establish an explicit threshold between an employer's permissible and impermissible communications:

> 94.(2) An employer is deemed not to contravene subsection (1) by reason only that they
>
> ...
>
> *(c)* express a personal point of view, so long as the employer does not use coercion, intimidation, threats, promises or undue influence.

[175] The Sims Report commented on its recommendation to recognize explicitly an employer's right to express an opinion, along with the necessary limitations:

> **Employer Expression of Opinion**
>
> We alluded previously to the fact that employers must be circumspect when employees choose or change union representation. However, while these decisions are for employees alone, acting freely, the law has never been that employers must remain absolutely silent. Several employers groups urged us to recommend a statutory recognition of what constitutes the employer's right to free speech.
>
> The Board has recognized this right to communicate and described how this fits with the prescriptions against coercive activity. Several provinces have expressed this right directly in the legislation, and we recommend that the Code include a similar recognition. This would in no way diminish the unions' exclusive rights to represent employees.
>
> RECOMMENDATION:
>
> Section 94(2) should be amended by adding a subsection to provide that an employer be deemed not to have contravened subsection (1) by expressing its views so long as the employer does not use coercion, intimidation, threats, promises or undue influence.
>
> (pages 63–64; emphasis in original)

[176] The CEP contested Intek's various written communications, as well as the oral comments it made to employees during compulsory management meetings.

[177] The Board will divide these communications by type (oral or written) and between the pre- and post-certification time periods.

[178] The CLRB had suggested at one time that an employer should stay neutral during organizing drives and could only respond to inappropriate union comments: *American Airlines Incorporated* (1981), 43 di 114; and [1981] 3 Can LRBR 90 (CLRB no. 301).

[179] The introduction of section 94(2)(*c*) has evidently impacted any pre-1999 concepts of employer neutrality.

[180] The Board in *Air Canada*, 2001 CIRB 131 at paragraph 24 commented on the addition of section 94(2)(*c*) to the *Code*:

> [24] Although this section is new to the *Code*, it is similar to corresponding provisions in provincial labour legislations, such as Alberta and Ontario. In those provinces, labour boards have generally interpreted the "expression" and "coercion, intimidation, threats, promises or undue influence" at face value, creating a fairly straightforward factual test (see, for example, *Calgary (City)*, [2001] Alta. L.R.B.R. 250, at page 265). If, therefore, a communication is found, as a matter of fact, to consist of personal expression, and is not found to contain coercion, intimidation, threats, promises or

> undue influence, it should fall into the exception created by section 94(2)(*c*) and be deemed not to constitute a violation of the *Code*.

[181] In *FedEx Ground Package System, Ltd.*, 2011 CIRB 614, the Board suggested certain principles, albeit in the context of communications during an organizing campaign, which may be considered when distinguishing between a personal point of view and comments which lose the *Code*'s protection:

> [81] From the case law, the Board derives the following non-exhaustive principles:
>
> – An employer is entitled to express its views and is not confined to mere platitudes. There is a middle ground, between mere platitudes and interference and undue influence, in which an employer is free to express its views.
>
> – In evaluating employer conduct, the Board should seek to establish whether the employer's conduct has detrimentally affected the employees' ability to express their true wishes. In other words, has the employer's conduct deprived the employees of the ability to express their true wishes in exercising their decision to associate or not?
>
> – The definition of intimidation, coercion and undue influence in a labour relations context contains this basic element: the invocation of some form of force, threat, undue pressure or compulsion, for the purpose of controlling or influencing an employee's freedom of association.
>
> – The fact that an employer does not want a union and expresses its opinion to that effect is not necessarily a violation of the *Code*; a factual analysis must be conducted to determine whether the manner in which this opinion is expressed contains an element of coercion, intimidation, threats, promises or undue influence.
>
> – The Board should consider the context in which the statements are made and the probable effect on a reasonable employee of the means used. Circulation of written material is the preferable mode, as the choice of written text is less intrusive than captive audience meetings or private discussions with employees.

[182] A section 94(2)(*c*) analysis examines when an outwardly appearing personal point of view in fact constitutes "coercion, intimidation, threats, promises or undue influence". The terms creating an exception to an employer's "free speech", as that term was used in the Sims Report, suggest either a punishment or, conversely, a reward connected to an employee's fundamental *Code* rights.

[183] Some interpretation guidance for these terms comes from their use elsewhere in the *Code*.

[184] For example, section 96 also uses the terms "coercion" and "intimidation":

> 96. No person shall seek by **intimidation or coercion** to compel a person to become or refrain from becoming or to cease to be a member of a trade union.
>
> (emphasis added)

[185] In *Bell Mobility Inc.*, 2011 CIRB 579 (*Bell Mobility 579*), an employer had alleged that the CEP violated section 96 through its manner of obtaining membership cards. The Board concluded the CEP could not have engaged in coercion or intimidation given there was an absence of force or threatened force in all of the alleged (and unproven) actions:

> [34] The Board agrees that there is no specific allegation about how an employee had been intimidated or coerced. Even if there were, an allegation that an employee might have been misled during an organizing campaign, a suggestion that the CEP expressly denied, does not constitute intimidation or coercion under section 96 of the *Code*.
>
> [35] In *TD Canada Trust* v. *United Steel*, 2007 FCA 285, the Board had considered more particularised allegations of intimidation or coercion than exist in the instant case. The Federal Court of Appeal stated the following about the Board's investigation of the allegations and conclusion:
>
> > [2] Two issues of natural justice that were raised by counsel for TD and counsel for the seven employees deserve consideration. The first contention was that the investigation undertaken on behalf of the Board into allegations of intimidation and coercion by union representatives was insufficient and procedurally unfair, amounting to a failure to investigate. In my view, this ground cannot succeed.
> >
> > [3] The intimidation allegations made by the employees complained about unannounced evening visits by union representatives to their homes. These visitors were persistent and sometimes stayed beyond their welcome. The investigator found this conduct not to be serious enough to amount to intimidation or coercion. While perhaps not as thorough an investigation as the applicants would have liked, the investigator did interview three of the seven complainants before reporting to the Board, partially in confidence, as is customary to protect the employees. **None of the complainants alleged that they signed membership cards as a result of any intimidation, although the only one who did sign indicated that afterwards she was sorry she did so. There was no allegation of violence or threats of violence. There was merely persistent, perhaps overly enthusiastic largely unsuccessful attempts at persuasion.** The Board is entitled to considerable deference in procedural matters. (*Telus Communications* v. *Telecommunications Workers Union*, [2005] F.C.J. No. 1253) It is largely the master of its own procedure, which should not be examined under a microscope. There is no basis for finding any denial of natural justice on this ground.
>
> [36] The Board has also considered the decision from the Ontario Labour Relations Board (OLRB) in *Atlas Specialty Steels*, [1991] OLRB Reports June 728, and agrees that intimidation and coercion require more than campaign promises:
>
> > [12] The meaning of "intimidation or coercion" within the context of section 70 has been considered in a large number of prior Board decisions... **In order for there to be even an arguable case for a breach of section 70, there must be intimidation or coercion of a sort which seeks to compel a person, amongst other things, to refrain from exercising any of the rights they might enjoy under the Act. There must be some force or threatened force, whether of a physical or non-physical nature.** ...

> [37] The Board agrees with the sentiments expressed by the OLRB and finds that, even accepting BMI's allegations, there is no evidence of intimidation or coercion in this case.
>
> (emphasis added)

[186] The terms coercion and intimidation in section 94(2)(*c*) similarly require some force or threat of force, whether physical or not. The concept of a "threat", a term also used in section 94(2)(*c*), is intertwined with the concepts of coercion and intimidation. They suggest a punishment for employees if they exercise, *inter alia*, their fundamental right to join a trade union.

[187] By contrast, the concept of a "promise" suggests an employer-offered reward designed to convince employees not to exercise their *Code* rights. A promise does not involve elements of force, or threats of force, but instead recognizes an employer's considerable economic power over employees' working lives.

[188] The concept of "undue influence", which could conceivably be either a punishment or a reward, depending on the circumstances, suggests that some influence may result from an employer's expression of a point of view. But the *Code* ceases to protect an employer's right to express a point of view if such influence becomes "undue".

[189] In short, the exceptions to employer free speech in section 94(2)(*c*) are designed to cover both punishments and rewards. In this case, the CEP satisfied the Board that some of Intek's communications with employees violated section 94(1)(*a*) and cannot be saved by section 94(2)(*c*).

a–Written communications during the CEP's organizing drive

[190] The Board heard evidence about five specific written communications in the period prior to certification. Intek sent three (Ex-1; Tabs 1, 2 and 4). The CEP sent two written communications to Intek employees about the benefits of supporting the organizing drive (Ex-18; Tabs 3-4).

[191] Neither Intek nor the CEP was flattering about the other in their written comments. Both were clearly attempting to influence the workforce.

[192] The CEP did not convince the Board that Intek's written communications prior to certification, when examined in context, crossed the threshold.

[193] An employer's ability to express a personal point of view is not limited merely to letting employees know that it would prefer not to have a union. Nonetheless, the more vigorous the employer's campaign, particularly during initial organizing, then the more likely an employer may pass the personal point of view threshold in section 94(2)(*c*). This is particularly relevant if the Board must consider whether any "influence" has become "undue".

[194] The Board was not convinced that Intek's comments that working conditions could go up, down or remain the same violated the *Code*. While these written communications must always be viewed in the context of each particular case, the CEP did suggest in its own written communications that it would improve wages and working conditions. The Board has to be wary of micro-analyzing the written communications which trade unions and employers might send during an organizing campaign.

[195] The Board has also not been convinced that Intek's written references to union dues, or the situation in the auto industry, as two other examples, exceeded its right to express a personal point of view. It seems evident that employees would not expect to obtain the benefits of the CEP's representation without some associated cost. In addition, the CEP responded to Intek's written comments about dues in its communiqué entitled "The Straight Goods".

[196] Similarly, while Intek's reference to the CAW and the recent challenges in the auto industry caused the CEP concern, it also implicitly reminded employees of the significant benefits auto workers had received by supporting the CAW over the decades.

[197] The Board has considered the parties' missives sent during the organizing campaign. They did not have the effect of preventing the CEP from being certified, which is one of the factors the Board may consider. Viewed in the overall context of this case, the Board was not convinced that Intek's written correspondence prior to the CEP's certification violated the *Code*.

b–Intek's post-certification written communications

[198] The Board heard evidence about three post-certification written communications Intek sent to its employees. The first, sent in April, 2012 (Ex-17; Tab 9), suggested questions employees should ask about the CEP's second strike vote. It also gave employees permission to use their company vehicles to attend the strike vote.

[199] Intek's second communication, sent in May, 2012 (Ex-17; Tab 11), asked employees, *inter alia*, to advise their managers in advance whether they would be working rather than striking in June, 2012. The third communication commented on the fact that two other similarly-situated contractors had recently entered into tentative agreements with the CEP (Ex-17; Tab 13).

[200] Of the three post-certification written communications, the May 2012 letter asking employees to identify in advance their strike intentions caused the Board the most concern. The pretext for Intek's request was its need to recover the tools and equipment, including vehicles, which remained in the technicians' possession.

[201] However, not all employees have Intek vehicles in their possession. For example, Mr. Burtch had to collect his vehicle each day. Similarly, some of Intek's employees work in its warehouse. And yet Intek asked each and every employee to advise it, 11 days before the planned June 15, 2012 strike, whether they wished to continue working.

[202] The Board can understand the need in this type of industry for orderly arrangements to be made for the return of property. But Intek's action in polling its employees about their strike intentions interfered with the CEP's representation rights. In the Board's view, Intek's request was designed to judge the strength of the upcoming strike, under the guise of scheduling employees and needing its equipment to be returned.

[203] The unknown success of either a strike or lockout is one of the key elements which leads parties to conclude last minute collective agreements. Canvassing members of the CEP's bargaining unit about their strike intentions differs little from ignoring the certified bargaining agent and canvassing working conditions directly with employees (see, for example, *Aliant Telecom Inc.*, 2005 CIRB 310).

[204] Both activities constitute an unlawful end run around the CEP's representation rights and interfere in its legitimate activities. This violates the *Code*.

c–Captive audience meetings

[205] In both September 2011 and May 2012, Intek discussed bargaining issues at compulsory, paid, company meetings. The topics raised at, and the timing of, these meetings was no coincidence. Not only did they take place during collective bargaining, but they occurred immediately prior to the CEP considering its strike option with employees.

[206] Intek suggested it was new to collective bargaining and acted innocently. The Board finds that Intek knew exactly what it was doing when Mr. Wilkins decided to make often identical comments on bargaining matters at each and every one of these company meetings.

[207] The September 2011 set of captive audience meetings were conducted despite several ULP complaints pending before this Board. The May 2012 meetings occurred after the Board's oral hearing on the various complaints had already commenced.

[208] During these captive audience meetings, Intek mislead its employees, who had no choice but to be present, about the state of negotiations. Intek portrayed the CEP in a negative light. Moreover, Intek's own Minutes, as well as the testimony from witnesses, demonstrated that the information it conveyed to employees about the CEP's offers was inaccurate.

[209] For example, Intek suggested that the CEP had requested a $300.00 daily minimum. Even if this was raised as a "hypothetical", Mr. Wilkins used it to support his thesis that the CEP was making unreasonable demands. The CEP's initial proposal for a daily minimum, as described earlier, was nowhere near this amount. Intek's comment that it was willing to agree to a daily minimum was also disingenuous. Its sole offer of a daily minimum was conditional on the CEP accepting, without any further negotiations, Intek's proposed seniority language.

[210] Intek further suggested to employees, some of whom it knew were not CEP supporters, that it could say more if employees asked questions. This concept, which is novel to the Board, seems designed to invite hostile, and possibly planted, anti-union questions at such meetings.

[211] Not only did Intek try to convince employees that the CEP's proposals did not make sense for them, but it was further unable to restrain itself from commenting about the topic of decertification.

[212] The Minutes further disclosed that Intek promised employees it had plans to ensure that things would be better in the future, such as for a "slow work" situation in Midland, Ontario. These promises were made within the underlying context of employees not supporting the CEP.

[213] The captive audience meetings were clearly designed to interfere with the CEP's representation of its members and its strike plans. Intek's actions in this area also violated the Duty. However, because of the way these reasons are structured, the specific bargaining remedies for the various violations of the Duty, including this one, will be examined, *infra*.

[214] Intek violated the *Code* when it bypassed the CEP and asked employees to disclose their strike intentions. Intek further violated section 94(1)(*a*) of the *Code* by holding captive audience meetings with bargaining unit members.

[215] The Board notes as well that Intek's offer to employees to use their company vehicles to drive to the strike votes demonstrates a curious approach to the application of its vehicle policy. The Board will comment further when examining Mr. Kou's situation.

[216] Sections 99(1) and 99(2), *infra*, contain the Board's remedial powers for violations of section 94(1)(*a*).

[217] The Board orders Intek, within 10 days of receipt of this decision, to make copies of this decision and to give a copy to each of its employees in the CEP's bargaining unit. Intek will confirm to the Board in writing when this has been done.

[218] In order to further remedy Intek's interference in the CEP's representation of employees, the Board orders that the CEP be permitted to meet with bargaining unit employees during the next round of compulsory departmental meetings in the various regions. Intek's evidence confirmed that it scheduled these meetings regularly.

[219] The CEP's time in those meetings will not be scheduled as the first or the last item on the agenda and will be conducted in the absence of Intek management. This direction is designed to ensure that the CEP receives the same general level of compulsory employee attendance that Intek had at the September 2011 and May 2012 meetings. Intek will pay bargaining unit employees for their attendance at these meetings, including for the time when the CEP addresses them.

[220] The CEP will have up to one hour at each of those regional meetings to summarize for employees in its bargaining unit the Board's findings and remedies, as well as to update employees on collective bargaining.

[221] Intek will continue with further agenda items at each meeting once the CEP has concluded its session. Intek will confirm to the Board in writing once proper arrangements have been made for these meetings. As with all of its remedies issued in these cases, the Board remains seized over the implementation of this order.

4–Did Intek violate section 94(3)(*a*) of the *Code* in its dealings with Mr. Burtch and Mr. Kou?

[222] Section 94(3)(*a*)(i) prohibits, *inter alia*, reprisals against union officers and representatives, as well as persons who participate in the promotion and administration of a trade union:

> 94.(3) No employer or person acting on behalf of an employer shall
>
> (*a*) refuse to employ or to continue to employ or suspend, transfer, lay off or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment or intimidate, threaten or otherwise discipline any person, because the person
>
> (i) is or proposes to become, or seeks to induce any other person to become, a member, officer or representative of a trade union or participates in the promotion, formation or administration of a trade union.

[223] The *Code* at section 98(4) reverses the burden of proof for complaints alleging a violation of section 94(3):

> 98.(4) Where a complaint is made in writing pursuant to section 97 in respect of an alleged failure by an employer or any person acting on behalf of an employer to comply with subsection 94(3), the written complaint is itself evidence that such failure actually occurred and, if any party to the complaint proceedings alleges that such failure did not occur, the burden of proof thereof is on that party.

a–The Board's role compared to that of a labour arbitrator

[224] The Board does not act as a third party labour arbitrator when it decides ULP complaints. The Board will not examine whether Intek had "just cause" for any of the actions it took. Rather it considers whether the context of Intek's actions suggest anti-union animus.

[225] Following a certification, but before the conclusion of a first collective agreement, section 36.1 of the *Code* allows the certified trade union to take just cause issues to a labour arbitrator:

> 36.1 (1) During the period that begins on the date of certification and ends on the date on which a first collective agreement is entered into, the employer must not dismiss or discipline an employee in the affected bargaining unit without just cause.
>
> (2) Where a disagreement relating to the dismissal or discipline of an employee during the period referred to in subsection (1) arises between the employer and the bargaining agent,
>
> (*a*) the bargaining agent may submit the disagreement to an arbitrator for final settlement as if it were a difference; and
>
> (*b*) sections 57 to 66 apply, with the modifications that the circumstances require, to the disagreement.

[226] A labour arbitrator under section 36.1(2) would examine arguments about "just cause".

[227] In *Acadian Coach Lines LP*, 2012 CIRB 654 (*Acadian 654*), which concerned a trade union officer's right to free speech, the Board described the reversal of the burden of proof. The Board will examine Intek's explanations for the actions it took. The Board will not consider whether Intek had "just cause" for its actions, but instead will draw the appropriate conclusions, based on the context and evidence, about Intek's underlying motivations:

> **ii) Burden of Proof (section 98(4))**
>
> [78] There will rarely be an admission that an employer took action against a union official for anti-union reasons. The Board must therefore weigh an employer's explanation for its actions given the overall context. In *Air Atlantic Limited* (1986), 68 di 30 (CLRB no. 600) at page 34, the CLRB described the focus of its analysis as follows:
>
> > The law on the subject of discrimination against employees for having exercised rights under the *Code* is well settled. If a decision by an employer to take any of the actions described in section 184(3)(*a*) [now section 94(3)(*a*)] against an employee has been influenced in any way by the fact that the employee has or is about to exercise rights under the *Code*, then the employer's actions will be found to be contrary to the *Code*. Anti-union motives need only be a proximate cause for an employer's conduct to run afoul of the *Code*:
> >
> > [quote omitted]

[79] The Board recently described in *Plante*, 2011 CIRB 582, the role circumstantial evidence plays when evaluating whether an employer has met the burden imposed by section 98(4) of the *Code*:

> ...
>
> [45] The Board agrees with TWI's reference to Mr. Justice Adams' summary in *Canadian Labour Law*, 2nd Edition, Volume 2 (Aurora: Canada Law Book, 2010) of the general practice for these types of unfair labour practice complaints:
>
> > 10.130 Canadian statutory provisions, barring discharge or other discriminatory treatment "because" or "for the reason that" employees are engaged in legitimate union activities, have been interpreted by courts as requiring scrutiny to see if "membership in a trade union was present to the mind of the employer in his decision to dismiss, either as a main reason or one incidental to it, or as one of many reasons regardless of priority" for the dismissal. Improper motive does not have to be the dominant motive. **Since employers are not likely to confess to an anti-union animus, tribunals have to rely on circumstantial evidence to draw inferences about employer motivation. These considerations may include evidence of the manner of the discharge and the credibility of witnesses, as well as "the existence of trade union activity and the employer's knowledge of it, unusual or atypical conduct by the employer following upon his knowledge of trade union activity, previous anti-union conduct and any other 'peculiarities'", such as discipline disproportionate to the offence alleged.**
> >
> > ...
>
> [46] **The Board considered the circumstantial evidence in this case and drew inferences whether Mr. Plante's union activities played a role in TWI's decision. The Board agrees with TWI's proposition that involvement in union activities does not prevent an employee from being held responsible for the consequences of his or her actions:**
>
> > Although Sandhu was clearly involved in union activity, to the knowledge of the employer, that union activity, in and of itself, does not serve to protect him from dismissal or discipline where such action is proven, by the employer, to have been taken without taint of anti-union animus. Employees cannot use the umbrella of the unfair labour practice provisions of the *Code* to protect themselves against disciplinary measures which are the result of their own misconduct ...
> >
> > (*D.H.L. International Express Ltd.* (1995), 99 di 126; and 28 CLRBR (2d) 297 (CLRB no. 1147), pages 132; and 303-304)

(*Acadian 654*; emphasis in original)

[228] The Board pays particular attention to an employer's disciplinary process, or lack thereof, when evaluating if it has met its burden under section 98(4) (see, generally, *Plante*, 2011 CIRB 582).

b–Mr. Burtch's ULP allegations

i–Work assignment

[229] In or about October, 2010, Mr. Burtch and his supervisor, Mr. Patterson, revisited the issue of Mr. Burtch being required to drive from his home in the Durham region to Intek's Markham office in order to collect his vehicle and perform his inspections. Mr. Burtch testified that none of his inspections were in the Durham region, despite the fact he resided there.

[230] Mr. Burtch had learned from schedules Intek had started preparing that his fellow full time inspector performed inspections in the Durham Region, as well as elsewhere. Mr. Burtch testified that other inspectors had been able to perform their work without having to drive to the Markham office.

[231] Intek's evidence demonstrated that it had previously accommodated Mr. Burtch in this inspector position. His assignment and tasks, including his travel, had been discussed and confirmed prior to the CEP's organizing campaign. Intek further demonstrated that its two full-time inspectors, including Mr. Burtch, were assigned to work out of the Markham office. Their manager Mr. Patterson had his office in Markham. Short-term accommodations for temporary inspectors had occasionally been made out of Durham, however.

[232] Mr. Burtch alleged that when he raised the travel issue with Mr. Patterson that the latter had used the expression "bad boy" during their conversation. Mr. Patterson, on the contrary, testified that Mr. Burtch had used the expression "bad boy" when asking about his assignment.

[233] The Board was impressed with the candour of both Mr. Burtch and Mr. Patterson. While they differed on the subject of who had first used the term "bad boy", each described his recollection in a forthright manner.

[234] The evidence satisfied the Board that Mr. Burtch's accommodation had been discussed and resolved before the CEP's organizing campaign. In addition, while Mr. Patterson discussed it again, Mr. Burtch had raised the issue.

[235] In the face of conflicting testimony, the Board concludes that it is more likely that Mr. Burtch raised the "bad boy" comment. Intek had given Mr. Burtch his assignment as an inspector before the CEP campaign had started. Mr. Burtch, after looking at the schedules, raised with Mr. Patterson the issue of why he had no inspections in the Durham region.

[236] It seemed incongruous that Mr. Patterson would have suggested that the March, 2010 assignment resulted from Mr. Burtch being a "bad boy", a reference, presumably, to the CEP's fall, 2010 organizing campaign. It seemed more likely that Mr. Burtch would have used that term when discussing a schedule that he noted in his testimony "did not make business sense".

[237] While the CEP's later organizing campaign did not give Mr. Burtch a right to receive a modified schedule, he was entitled to have his request considered and a decision made free of anti-union animus.

[238] It was not disputed that Mr. Patterson advised Mr. Burtch that he did not have the authority to change the assignment. He referred Mr. Burtch to Mr. Wilkins. There was no evidence that Mr. Burtch pursued the matter further.

[239] The Board concludes that Intek's refusal to modify Mr. Burtch's pre-existing assignment was not done for anti-union reasons. Evidently, the Board does not evaluate whether Intek's original creation of that particular assignment, and its associated travel, was fair or efficient.

[240] The Board's analysis might have been different had Intek moved Mr. Burtch to his current assignment after learning of the CEP's organizing campaign. Similarly, if the written schedules had taken away Durham inspections which Mr. Burtch had been performing, then a different conclusion might have occurred. But those were not the facts in this case.

ii–Intek's requirement for Mr. Burtch to report his break and lunch times

[241] In December, 2010, an Intek employee had complained about Mr. Burtch approaching him to sign a membership card while he was working. Intek met with Mr. Burtch and imposed on him a new requirement to report his lunch and break times (Ex-1; Tab 3).

[242] Intek's Mr. Wilkins suggested that Mr. Burtch and he agreed that this reporting measure would protect both sides during the organizing drive. Mr. Burtch, on the other hand, denied any such agreement. In its initial February 1, 2011 ULP complaint, the CEP noted it had contested this measure imposed on Mr. Burtch.

[243] Intek failed to convince the Board that this reporting mechanism was not tainted by anti-union animus. It is clear that an employee cannot interrupt other employees to discuss union membership when they are working (*Code* section 95(*d*)). The situation may be complicated by the fact that Intek's employees do not work at a single location; it may not be clear to everyone when individual technicians are on breaks or lunch periods.

[244] The measure of insisting that Mr. Burtch, a CEP organizer, report his whereabouts when on breaks and lunch periods is in itself suspicious since it goes further than merely advising him of the ground rules for an organizing campaign. But what convinced the Board that this measure contravened the *Code* was that Intek never lifted Mr. Burtch's reporting requirement, even after the Board certified the CEP in April, 2011.

[245] By imposing what appears to be a permanent measure requiring only Mr. Burtch to report his breaks and lunch periods, Intek failed to meet its burden of proof that Mr. Burtch's role with the CEP was not a motivating factor in its decision.

[246] The Board orders that Intek remove the December 7, 2010 (Ex-1; Tab 3) letter from Mr. Burtch's file and cancel immediately any special reporting requirements it has imposed on him.

iii–Mr. Burtch's vehicles

[247] Mr. Burtch testified that, while he performed his inspections, he suspected that someone was entering his Intek vehicle to look at his CEP organizing materials. He testified certain materials or objects had moved. Intek, through Mr. Wilkins, denied it ever entered Mr. Burtch's vehicle.

[248] Mr. Burtch also raised concerns about his personal vehicle when it was left in the Intek parking lot. For example, he had once found the hood unlatched when he returned from his inspections. When Mr. Burtch raised it with Mr. Patterson, the latter suggested he move his vehicle into an area where it would be recorded by the parking lot's security cameras.

[249] The Board is satisfied that Intek met its burden for this allegation. While the Board acknowledges Mr. Burtch's suspicion, there was no evidence that anyone from Intek other than Mr. Burtch entered his Intek vehicle when he was on the road.

[250] The Board was not certain if Mr. Burtch's allegations were sufficient to create a *prima facie* case that representatives of Intek had been entering his vehicle. There were no particulars regarding who allegedly did it, when and at what location. The Board understands the suggestion arising from Mr. Burtch's allegations, but is uncertain how Intek could respond without any concrete particulars.

[251] Even if a *prima facie* case existed, Mr. Patterson's reaction when proposing a way for Mr. Burtch to ensure the security cameras recorded his personal vehicle satisfied the Board that no anti-union animus existed.

iv–Delay in benefit coverage for Mr. Burtch's dependent

[252] During final argument, the CEP argued that Intek had failed to meet its burden regarding an allegation found only in its February, 2011 written ULP complaint. That allegation contested a delay in benefit coverage for Mr. Burtch's dependent (February 1, 2011 complaint; paragraph xxiii).

[253] The CEP led no evidence on the issue at the hearing, despite Mr. Burtch being called to testify on two separate occasions. The CEP argued that the Board should find Intek violated the *Code* since it failed to address the issue in any of its oral evidence.

[254] The Board has decided to dismiss the CEP's argument for two reasons.

[255] First of all, the Board has stated how important it is for parties to file full pleadings on all issues (see, for example, *Wildman*, 2013 CIRB 675). This requirement is designed to allow the Board either to decide the case without an oral hearing, as permitted by section 16.1 of the *Code*, or to take other procedural steps.

[256] If the Board decides to hold an oral hearing, then it is incumbent on a party to put forward the evidence in support of the allegations in its pleadings, whether or not it bears the burden of proof.

[257] If a party remains silent during an oral hearing about an issue it raised in its pleadings, then the Board can reasonably presume that the issue is no longer in dispute between the parties. Parties frequently decide not to proceed on certain issues, even if they originally raised them in the pleadings. The Board leaves these strategic decisions to the parties.

[258] Secondly, even if the Board had accepted the CEP's technical argument that Intek bore the burden of proof for the question of Mr. Burtch's benefit coverage, it is satisfied that Intek responded to the issue in its written pleadings (February 15, 2011; Response at pages 7–8).

[259] This therefore created a defined issue on which the parties would be expected to lead oral evidence. When the CEP did not lead any evidence, the Board concluded that Intek's explanation in its pleadings of what had occurred at Great West Life, which caused the delays in question, had resolved this issue.

[260] The Board concludes Intek did not violate the *Code* when Mr. Burtch's dependent experienced a delay in obtaining benefit coverage.

c–Mr. Kou's ULP allegations

[261] As was the case with Mr. Burtch, Intek has satisfied its burden for some issues involving Mr. Kou, but has failed for others.

i–The condition of Mr. Kou's Intek vehicle

[262] Mr. Kou was candid about smoking in his vehicle and acknowledged that his ashes could fall into the instrument panel area. Intek had warned Mr. Kou in September, 2010 about the condition of his vehicle and later charged him for cleaning it when he asked for a new vehicle.

[263] Did this charge result from Mr. Kou's union activities?

[264] An employer cannot discipline an employee merely because that employee has started to exercise rights under the *Code*. However, the exercise of *Code* rights does not mean that an employer is unable to manage ongoing employment/labour relations matters.

[265] The Board's challenge is to decide which of these competing principles applies to different situations. Both principles could apply concurrently in some situations.

[266] Intek produced for the Board an invoice regarding a previous repair costing over $300.00 which had resulted from Mr. Kou's cigarette ashes (Ex-18; Tab 45). On that earlier occasion, Intek had been obliged to replace that vehicle's instrument cluster because of the damage caused by excessive cigarette ash. Intek has a no smoking policy for its vehicles. Intek did not discipline Mr. Kou for this original event.

[267] This evidence satisfied the Board that Intek did not violate the *Code* when the issue of the cleanliness of Mr. Kou's vehicle arose again. Intek had warned Mr. Kou about cigarette ash in his vehicle. When Mr. Kou later requested another vehicle, Intek gave him the choice to clean it, or have it cleaned. Mr. Kou stated he had already cleaned it.

[268] The prior event involving damage to the vehicle, a September 2010 written warning about his vehicle being dirty, along with Mr. Kou being given a choice to clean his vehicle (again) before exchanging it, all satisfied the Board that Intek's $45.20 charge to clean Mr. Kou's vehicle did not arise from anti-union animus. It had instead resulted from an ongoing issue between them.

ii–Mr. Kou's remuneration

[269] The CEP alleged that Intek took steps to reduce Mr. Kou's remuneration in 2011, compared to that which he had earned in 2010. The allegations included suggestions that Mr. Kou was not being assigned the same remunerative work as before.

[270] Intek produced a table (Ex-18; Tab 16) comparing remuneration for Mr. Kou in 2010 and 2011. It was not contested that Mr. Kou's remuneration had decreased. Intek's table, however, also showed that other allegedly comparably-situated technicians had also had their remuneration decrease, though Mr. Kou had the largest decrease of the group. Mr. Kou had a decrease of 9.4%, while the next two technicians had decreases of 8.5 and 8.6% respectively.

[271] Intek also prepared a chart of Mr. Kou's cell phone use and argued he was spending a far larger amount of time on his cell phone in 2011 (Ex-18; Tab 15) compared to in 2010. Intek similarly noted that "bundle" opportunities had decreased for all technicians.

[272] During the course of this case, the CEP made several requests for additional production. For the remuneration issue, the Board gave the CEP the opportunity to suggest the names of any other similarly-situated technicians whom it felt must be included in the remuneration table in order to show accurate results. This would address any suggestion of cherry-picking.

[273] The CEP did not suggest the names of other employees who should be added to the comparison table Intek had prepared.

[274] The Board has concluded that senior technician remuneration, which is based on piecework, decreased in 2011. The evidence satisfied the Board that this decrease, which impacted Mr. Kou along with other similarly-situated technicians, did not result from anti-union animus. Mr. Kou had agreed in his cross-examination that the other technicians in Intek's table "are similar to me".

iii–Rotary Road call

[275] The Board heard contradictory evidence regarding Mr Kou's February 25, 2011 customer call at an address on Rotary Road in Scarborough, Ontario.

[276] Mr. Kou testified that the customer had not been home when he arrived and that he had been unable to find the TAP despite looking for between 30-60 minutes. Mr. Kou alleged that his supervisor, Mr. Hernandez, had told him to continue with his next call.

[277] Mr. Hernandez testified that he had instructed Mr. Kou to wait for him to arrive. When Mr. Hernandez arrived, Mr. Kou had left. Mr. Hernandez testified he found the customer at home and that the TAP was still surrounded by undisturbed snow. He said he then completed the call.

[278] The CEP urged the Board not to believe Mr. Hernandez' evidence. For example, it alleged that he was not honest regarding the instructions he gave to Mr. Kou. The CEP alleged Mr. Hernandez had authorized Mr. Kou to go to another call. The CEP also disputed his view that he found the snow undisturbed around the TAP.

[279] Each witness appeared forthright under oath when explaining his version of events. For example, Mr. Kou testified in chief that when Mr. Hernandez initially asked him to wait at Rotary Road, he replied "I do piecework; I cannot wait". He further suggested he would return when Mr. Hernandez arrived.

[280] The Board has decided that it prefers Mr. Hernandez' recollection of events to that of Mr. Kou for the following reasons.

[281] The incident arose when Mr. Kou called his supervisor. Without this call from Mr. Kou, Mr. Hernandez would have never entered the scene.

[282] The Board was satisfied that Mr. Hernandez, in the course of his regular supervisory duties, went to a problem call. Mr. Kou had agreed in cross-examination that issues involving his leaving jobs uncompleted had arisen in the past. When Mr. Hernandez learned Mr. Kou was no longer present at the customer's premise, he completed the work. Because Mr. Hernandez had told Mr. Kou to wait for him, but he did not, Mr. Hernandez brought the incident to Intek's attention.

[283] Mr. Kou testified in both chief, and again in cross-examination, that he worked at the Rotary Road call for between 30–60 minutes. However, a print out of the times he input for his calls that day (Ex-18; Tab 24) did not seem to support this time frame.

[284] Mr. Kou, according to his work print out, was at Rotary Road for at the most 31 minutes. This assumes he could have completed his previous call at 5:15 p.m. and still started the Rotary Road call at the exact same time (5:15 p.m.). The print out suggested he left Rotary Road at 5:46 p.m.

[285] On a balance of probabilities, Intek persuaded the Board that its supervisor had dealt with an issue which had also arisen in the past. It issued Mr. Kou a written warning. The Board does not judge whether a written warning was appropriate in the situation. Mr. Kou and Mr. Hernandez may have simply misunderstood each other. But it was satisfied that Mr. Hernandez' supervisory actions were not tainted by anti-union animus.

iv–Record of Action for Performance (Metrics)

[286] On March 8, 2011, Intek gave Mr. Kou a second Record of Action (written warning) purportedly for unacceptable performance. Intek did not meet its burden, despite showing that other technicians also received Records of Action contemporaneously, that anti-union animus had not played a part in its decision.

[287] The evidence disclosed that Mr. Kou was a superior performer in 2010. He ranked 13th out of over 45 technicians in terms of work and service orders (Ex-18; Tab 13). In early 2011, his ranking had slipped to 35th (Ex-18; Tab 14).

[288] The Board accepts that Intek gave such notices concurrently to several other technicians. Had Mr. Kou received the same notice as they did, then Intek might have met its burden. But the evidence showed that Intek singled Mr. Kou out for special treatment.

[289] For example, while most other technicians received an oral warning and were encouraged to improve or else they would be placed on a performance plan, Mr. Kou received a written warning. Intek further advised him that his employment could be in jeopardy if he did not improve.

[290] Given Mr. Kou's superior performance in 2010, and the lack of any intervening warnings about his performance metrics, Intek failed to convince the Board that this differentiation in treatment from other technicians had not been influenced by Mr. Kou's CEP activities.

[291] By way of remedy, the Board orders that this written warning be removed from Mr. Kou's file.

v–Laptop: three-day suspension

[292] On March 29, 2011, Intek imposed a three-day suspension on Mr. Kou for issues related to his laptop. Besides the fact the laptop contained two mapping programs, which Mr. Kou candidly admitted he had added to help him find customers' addresses, Intek also alleged the laptop had a virus and had been used to visit pornographic websites.

[293] Intek's suspension letter also referred to its previous comments about the state of Mr. Kou's vehicle, seemingly as justification for moving beyond a written warning and imposing a three-day suspension.

[294] Despite using paperwork which appears to incorporate the principle of progressive discipline, Intek failed to persuade the Board that it had not unlawfully targeted Mr. Kou with this specific discipline.

[295] First of all, and this occurred for several issues, Intek's witnesses displayed a surprising lack of recollection about the facts. For this event, Mr. Kou's manager, Mr. Jeff Anthony, had virtually no independent recollection of the findings of the IT department on which he based his decision to impose a three-day suspension.

[296] Intek also did not call to testify the IT person whose "Report" was used to discipline Mr. Kou.

[297] Moreover, Intek's discipline letter and attached IT "Report" (Ex-18; Tab 44) suggested that Mr. Kou had visited multiple non-work related websites, including pornographic websites. However, the supporting IT "Report", which was never presented to Mr. Kou for comment, referred only to "porn site (Feb. 10)", but provided no particulars about its web address.

[298] The superficial documentation, along with Intek's lack of virtually any recollection of the specifics supporting this disciplinary measure, prevented Intek from meeting its burden under the *Code*.

[299] The Board orders that Intek remove this three-day suspension from Mr. Kou's file. Intek will also fully reimburse Mr. Kou for any and all remuneration he lost due to the suspension.

[300] The above incidents occurred prior to the CEP's certification on April 5, 2011. A few other incidents involving Mr. Kou occurred subsequent to that certification and the sending of the CEP's notice to bargain on April 11, 2011.

vi–Alleged abuse of vehicle privileges

[301] In July, 2011, Intek disciplined Mr. Kou for inappropriate use of his vehicle. Intek provided Mr. Kou with a written warning on July 13, 2011 for having stopped on the way home from work at a friend's house for the evening.

[302] On July 19, 2011, Intek took away Mr. Kou's privilege of being able to take his Intek vehicle home after he allegedly used the vehicle on his day off. This discipline arose out of the same event where Intek employees had parked their vehicles in bank customer parking spots.

[303] Intek did not satisfy the Board that its two actions had no relation to Mr. Kou's ongoing union activities.

[304] Standing alone, Mr. Kou's use of his vehicle to stop off and stay the evening at a friend's home might have run afoul of Intek's vehicle policy. The stop was not a short event to pick things up, such as groceries, on his way home from work. But the stop did appear to be on his route home, without any deviation.

[305] The Board cannot ignore Intek's flexible way of applying its vehicle policy. In September, 2011 and April, 2012 Intek authorized its employees to ignore the provisions of the same vehicle policy so that they could drive their company vehicles to the CEP's strike votes.

[306] Intek also singled Mr. Kou out for discipline. As described earlier, a bank manager had complained to Rogers about multiple Intek trucks, including that of Mr. Kou, using its parking spaces. Rogers referred the complaint to Intek.

[307] Despite the fact that there were several other Intek technicians parked at the bank, none was ever interviewed or disciplined, except Mr. Kou.

[308] Moreover, Mr. Kou testified that he had been doing "repeats" on his day off and that his supervisor, Mr. Sean Hossein, had approved it. Intek did not call Mr. Hossein to address Mr. Kou's allegation, though it had given Mr. Kou the "Brown v. Dunn" warning that Mr. Hossein would provide contrary evidence.

[309] The lack of any investigation about the incident at the bank satisfied the Board that Intek took its disciplinary steps, in whole or in part, due to Mr. Kou's union activities.

[310] Similarly, when Mr. Kou asked his manager, Mr. Anthony, why he was the only employee disciplined, Mr. Anthony allegedly referred to Mr. Kou's role in bringing in the union. Mr. Anthony was never questioned about this allegation when he gave his evidence.

[311] Accordingly, the Board orders that Intek rescind and remove from his file the July 13, 2011 written warning, as well as the July 19, 2011 letter revoking Mr. Kou's vehicle privileges.

vii–Language of work in Intek's warehouse

[312] The final event involving Mr. Kou concerned an August 4, 2011 written "oral warning" (Ex-18; Tab 53) issued to him for speaking in a language other than English in Intek's warehouse.

[313] Intek did not persuade the Board that Mr. Kou's union activities played no role in its decision to issue a warning only to him.

[314] The Board again found Intek's process wanting. For example, there appeared to be no investigation of what had occurred. For a conversation to have occurred in a language other than English, Mr. Kou could not have been the only person involved.

[315] All employees should be held accountable to the same disciplinary standards. In this case, Intek only disciplined Mr. Kou for being involved in something which must have involved at least one other person, if not several others. There was no suggestion that Mr. Kou was the lone speaker who violated Intek's policy.

[316] The Board orders Intek to remove this warning from Mr. Kou's file.

[317] Following August, 2011, there were no other events raised before the Board concerning alleged discipline for CEP supporters. The focus turned instead to bargaining between the CEP and Intek.

5–Did Intek violate the Duty (section 50(*a*))?

A–Duty to bargain in good faith and the Board's remedial powers

[318] Section 50(*a*) of the *Code* obliges employers and trade unions to bargain in good faith and make every reasonable effort to enter into a collective agreement:

> 50. Where notice to bargain collectively has been given under this Part,
>
> (*a*) the bargaining agent and the employer, without delay, but in any case within twenty days after the notice was given unless the parties otherwise agree, shall
>
> (i) meet and commence, or cause authorized representatives on their behalf to meet and commence, to bargain collectively in good faith, and
>
> (ii) make every reasonable effort to enter into a collective agreement;

[319] Section 50(*a*) of the *Code* imposes two concurrent bargaining duties. Firstly, an employer and a trade union must meet and commence bargaining in good faith, a situation which is analyzed subjectively. Secondly, they must make every reasonable effort to enter into a collective agreement, an obligation which the Board examines objectively. For ease of reference, the Board earlier defined these concurrent obligations as the "Duty" in these reasons.

[320] In *Royal Oak Mines Inc.* v. *Canada (Labour Relations Board)*, [1996] 1 S.C.R. 369 (*Royal Oak*), the Supreme Court of Canada (SCC) described these bargaining obligations:

> [41] ... In order for collective bargaining to be a fair and effective process **it is essential that both the employer and the union negotiate within the framework of the rules established by the relevant statutory labour code.** In the context of the duty to bargain in good faith a commitment is required from each side to honestly strive to find a middle ground between their opposing interests. Both parties must approach the bargaining table with good intentions.

> [42] Section 50(*a*) of the *Canada Labour Code* has two facets. Not only must the parties bargain in good faith, but they must also make every reasonable effort to enter into a collective agreement. Both components are equally important, and a party will be found in breach of the section if it does not comply with both of them. **There may well be exceptions but as a general rule the duty to enter into bargaining in good faith must be measured on a subjective standard, while the making of a reasonable effort to bargain should be measured by an objective standard which can be ascertained by a board looking to comparable standards and practices within the particular industry. It is this latter part of the duty which prevents a party from hiding behind an assertion that it is sincerely trying to reach an agreement when, viewed objectively, it can be seen that its proposals are so far from the accepted norms of the industry that they must be unreasonable.**
>
> (emphasis added)

[321] As the SCC noted, parties engaged in collective bargaining must negotiate within the "framework of the rules established by" the *Code*. Parties to a complaint should examine the *Code*'s framework and plead their case accordingly, since the Board's role is to analyze complaints about a violation of the Duty in a manner consistent with that framework.

[322] What is the *Code*'s "framework" when it comes to collective bargaining, including situations involving first collective agreements?

[323] For first contract situations, the *Code* at section 80(1) gives the Minister of Labour (Minister) the discretion to ask the Board to examine whether it should settle the terms and conditions of the parties' first collective agreement:

> 80.(1) Where an employer or a bargaining agent is required, by notice given under section 48, to commence collective bargaining for the purpose of entering into the first collective agreement between the parties with respect to the bargaining unit for which the bargaining agent has been certified and the requirements of paragraphs 89(1)(*a*) to (*d*) have otherwise been met, **the Minister may, if the Minister considers it necessary or advisable, at any time thereafter direct the Board to inquire into the dispute and, if the Board considers it advisable, to settle the terms and conditions of the first collective agreement between the parties.**
>
> (emphasis added)

[324] This direction from the Minister may only be given after the parties have completed certain required steps in the collective bargaining process (*Code* sections 89(1)(*a*)–(*d*)).

[325] The Board, which operates at arm's length from the Minister and therefore has no first-hand knowledge, may probably safely assume that the existence of any Board decisions concerning the employer and the newly certified bargaining agent could constitute a possible factor in the exercise of this discretion.

[326] In non-first contract situations, the Board has, exceptionally, imposed a comparable third party process to conclude a collective agreement as a remedy for an egregious violation of the Duty.

[327] In order to understand the *Code*'s framework for first contract and collective agreement renewal situations, it is helpful to review the Board's exercise of its remedial powers in bargaining cases.

1–The Canada Labour Relations Board and the Duty (Pre-1999)

[328] The CLRB examined competing collective bargaining principles when considering whether a party has violated its section 50(*a*) Duty.

[329] A fundamental *Code* principle posits that Board proceedings must not be used as a substitute for free collective bargaining. The Board must be vigilant not to interfere in the parties' relative balance of power. It is this fluid balance which leads parties to conclude appropriate agreements. It is therefore up to the parties to develop their own labour relations strategy in this area.

[330] Accordingly, while the Board might certify a smaller bargaining unit to give employees access to collective bargaining, it is solely up to the trade union to judge what effect a smaller unit might have on its later bargaining power. Similarly, employers must weigh their ability to continue to provide services when faced with a strike. The parties attain their collective bargaining objectives based on their bargaining power, rather than from Board intervention.

[331] While the Board will resist being used by any party as a tool to improve its negotiating position, it must still ensure that a party does not violate the Duty and undermine the other party's statutory right to engage in collective bargaining.

[332] The CLRB in *CKLW Radio Broadcasting Limited* (1977), 23 di 51; and 77 CLLC 16,110 (CLRB no. 101) (*CKLW*) described these principles:

> ... The Board is not an instrument for resolving bargaining impasses. Proceedings before the Board are not a substitute for free collective bargaining and its concomitant aspect of economic struggle. **Therefore, the Board should not judge the reasonableness of bargaining positions, unless they are clearly illegal, contrary to public policy, or an indicia, among others, of bad faith. Because**

> **collective bargaining is a give and take determined by threatened or exercised power, the Board must be careful not to interfere in the balance of power and not to restrict the exercise of power by the imposition of rules designed to require the parties to act gentlemanly or in a genteel fashion. At the same time, the Board must ensure that one party does not seek to undermine the other's right to engage in bargaining or act in a manner that prevents full, informed and rational discussion of the issues.**
>
> (pages 58–59)
>
> (emphasis added)

[333] In *Iberia Airlines of Spain* (1990), 80 di 165; and 13 CLRBR (2d) 224 (CLRB no. 796) (*Iberia Airlines*), the CLRB again emphasized the importance of the principles of free collective bargaining and lawful bargaining objectives:

> The Board followed this approach, and summarized it clearly, in *Canadian Broadcasting Corporation* (1987), 70 di 26 (CLRB no. 629), when, after reviewing the decisions of the Board in this area, it stated:
>
> > Contrary to what some commentators may have expressed, the Board still maintains that it is not a substitute for **free** collective bargaining. The Board will not be used as an instrument for resolving collective bargaining impasses and it will only intervene in the **free** collective bargaining system in extraordinary cases. **The Board will make every effort not to interfere with the balance of power at the bargaining table. Nor will it restrict the exercise of such power unless a party is using its power to achieve objectives which are clearly unlawful or which are intended to defeat the purposes of the Code.**
>
> (page 188; emphasis in original)

[334] The *Code* in the CLRB's era did not describe explicitly the Board's remedial powers when it found a party had violated the Duty. But the *Code* still gave the CLRB appropriate authority to remedy violations of the Duty, especially given the broad wording of section 99(2), the text of which has remained constant over time:

> 99.(2) For the purpose of ensuring the fulfilment of the objectives of this Part, the Board may, in respect of any contravention of or failure to comply with any provision to which subsection (1) applies and in addition to or in lieu of any other order that the Board is authorized to make under that subsection, by order, **require an employer or a trade union to do or refrain from doing any thing that it is equitable to require the employer or trade union to do or refrain from doing in order to remedy or counteract any consequence of the contravention or failure to comply that is adverse to the fulfilment of those objectives.**
>
> (emphasis added)

[335] In *Royal Oak*, *supra*, a majority of the SCC approved some of the remedies which the CLRB had traditionally imposed to remedy violations of the Duty. These had included, *inter alia*, orders that an employer table a complete collective agreement for the union's consideration. The CLRB's overriding remedial goal was to return the parties to the position they would have been in, but for the breach of the *Code*:

> [84] **In a number of cases the Canada Labour Relations Board has ordered, correctly in my view, that an employer make a specific offer, including an offer of a complete collective agreement, in circumstances where the Board has concluded that such a remedy is necessary to counteract the effects of the employer's failure to bargain in good faith.** The remedy imposed in *Eastern Provincial Airways, supra*, was very much like the remedy ordered by the Board in the present case. As in the case at bar, the Board found that the employer had failed to bargain in good faith, and in addition, had committed other unfair labour practices. The Board issued an extensive remedial order which required the employer to resubmit an earlier proposed collective agreement, and an order that all the striking employees were to be returned to work in order of seniority. In addition, all promotions during the strike were declared null and void and reprisals against striking and non-striking pilots were prohibited. **Thus, it can be seen that the Board in the *Eastern Provincial Airways* case, as in the instant one, ordered the employer to table its last offer to the union for ratification and added specific terms and conditions which dealt directly with the breach.**
>
> [85] The Federal Court of Appeal varied the order of the Board by reinstating the promotions on the ground that they had not been illegal and thus, the Board lacked the authority to declare them null and void. **However, the Court of Appeal very properly concluded that the Board's order could not be characterized as imposing a collective agreement on the parties. Rather it was simply a measure designed to return the parties to the position they would have been in if there had not been bad faith bargaining.** This reasoning is in my view correct and is equally applicable to the case at bar.
>
> ...
>
> [89] One final case illustrating that the Board has properly and validly designed remedies akin to that which was ordered in the case at bar is *Iberia Airlines, supra*. After finding that the employer had bargained in bad faith the Board intervened with a remedy. It took this action in light of the nature of the violations of the Code and based on its conviction that the employer had no intention of changing its bargaining position unless a third party intervened. It concluded that if the employer had not taken the position of paying lower wages to unionized staff than to those who were non-unionized, the union members would have been in a position, over one year ago, to vote on a complete draft collective agreement. **Accordingly, the Board ordered that, among other things, the employer table, in writing, within two weeks, a complete collective agreement for the union's consideration, which was to include certain specific conditions drawn up by the Board which resolved four of the most contentious issues.**
>
> (emphasis added)

2–The *Royal Oak* case

[336] In *Royal Oak*, *supra*, the SCC issued the leading decision on the CLRB's remedial powers when faced with a violation of the Duty. The CLRB had issued an extraordinary remedy including, if necessary, binding arbitration.

[337] The SCC's majority decision described the issue arising from the CLRB's remedial order:

> [4] CORY J. – In May of 1992, the unionized workers of Royal Oak Mines voted overwhelmingly to reject a tentative agreement put forward by the appellant. A strike of 18 months' duration followed. It was marked by tragic violence, and a cancerous ill will that divided workers from management, workers from workers and indeed the whole community of Yellowknife. The Canada Labour Relations Board unanimously found that the appellant employer had failed to bargain in good faith: (1993), 93 di 21, 94 C.L.L.C. ¶ 16,026. **In light of the long history of intransigence and the bitterness of the parties the Board directed the appellant to tender the tentative agreement which it had put forward earlier with the exception of four issues about which the appellant employer had changed its position. The parties were given 30 days of bargaining to settle those issues. It they remained unresolved then compulsory mediation was to be imposed. At issue is the jurisdiction of the Board to make this order.** To understand what impelled the Board to make the order and to determine if it was within its jurisdiction to do so it is necessary to set out the factual background in some detail.
>
> (emphasis added)

[338] The SCC commented on the extraordinary and tragic factual background facing the CLRB when it decided to order binding arbitration:

> [12] **On September 18, 1992, there was an explosion in the mine and nine workers were killed. This act stretched to the limit the sorely tried patience of the people of Yellowknife. The far-reaching effects of the dispute, which extended well beyond just the parties involved, must be understood in the context of the community.** Yellowknife, a relatively isolated town, has a population of roughly 15,000. Some of the employment in the area is transient. Yet, there exists a core of residents who have deep roots in the community. Mining comprises a very significant part of the industry and economy of the area and the miners and their families tend to form a close knit social group. The Mayor of Yellowknife, Pat McMahon, described her community as "a community of neighbourhoods". A professor, Dr. Nightingale, who prepared a report on the dispute, concluded that "[m]inor events in the community are felt by many; significant events, such as the strike at Royal Oak touch the lives of everyone". He further observed that the hostile climate which permeated the situation was such that "beatings, murders, death threats and bomb threats **have ruptured** the life of the mine and the community". The severity of the dispute's impact on the community ultimately led the Mayor to write to the then Prime Minister, requesting her to do whatever it would take to get the dispute settled.
>
> [13] **Following the explosion a striking member of the bargaining unit was charged and convicted of murder. Approximately a week after the explosion, the Minister of Human Resources and Labour suggested that the parties agree to a process of voluntary binding arbitration as a way of resolving the dispute. Despite all the violence and tragedy, the parties remained intransigent and rejected this suggestion.** Accordingly, on September 30, 1992, the Minister appointed two special mediators, Messrs. Ready and Munroe, to inquire into the labour dispute and assist the parties in negotiating a settlement of the dispute and the renewal of the collective agreement. The special mediators met with representatives of the parties and, on October 30, 1992, they submitted an interim report to the Minister and the parties.
>
> (emphasis added)

[339] Chief Justice Lamer issued separate, but concurring, reasons with the majority and emphasized the importance of the principle of free collective bargaining:

> [2] **However, I have chosen to write separately because I wish to stress that such an extraordinary order, while justified in these circumstances, runs against the established grain of federal and provincial labour codes by overriding the cherished principle of "free collective bargaining" which animates our labour laws.** While Cory J. is correct in emphasizing that the principle of "free collective bargaining" is not the only policy interest advanced by the Code, it is undoubtedly one of the most important and one of the most sacred. Labour movements in Eastern Europe have fought for decades to resist state-imposed collective agreements, and it would be an ironic and tragic development in our labour law if the principle of free collective bargaining were to be regularly subordinated to the societal goal of the "constructive settlement of disputes". **With those thoughts in mind, I find that in the absence of exceptional and compelling circumstances such as those prevailing in this case, it will normally be patently unreasonable for a labour board to impose such an invasive remedial order in light of the core value of free collective bargaining enshrined in the Code.**
>
> [3] Subject to these comments, I concur with the judgment of Cory J. and I would dismiss the appeal.
>
> (emphasis added)

[340] Mr. Justice Cory, writing for the majority, upheld the CLRB's binding arbitration remedial order:

> [61] In my view, the remedy directed by the Board was not patently unreasonable, rather it was eminently sensible and appropriate in the circumstances presented by this case. A judicial review of the order must take into consideration both the complex factual background, and the prior involvement of the Board in this dispute. In this case, the factual background presented to the Board was such that it cried aloud for the imposition of a remedial order.
>
> ...
>
> [63] **In fashioning an order the Board was obliged to take into account the long violent and bitter history of the dispute. Moreover, the facts in this case are so extraordinary that, if it were necessary, the Board was justified in going to the limits of its powers in imposing a remedy. The appellant's suggestion, that the Board should have rectified the breach by simply ordering the appellant to cease taking such an intractable position on the issue of the dismissed employees and then requiring the parties to recommence bargaining, is hopelessly inadequate. In light of the long and turbulent history of the parties' attempted negotiations the typical "cease and desist" order would have been, as the Board described it, "unrealistic and even a cruel waste of time" (p. 28).** It was clear that the parties would never come to an agreement on their own with respect to the issue of the dismissed employees. In fact, the Industrial Inquiry Commissioners concluded in their final report that everyone had to be realistic enough to acknowledge that on some of the matters in dispute, "the parties are not likely ever to come to an agreement on their own." Therefore, taking into account this prediction, the unfortunate bargaining history and the effect of the dispute on the community, the Board was correct in recognizing that a more effective remedy was required.
>
> ...

[92] It is trite to observe that the factual situation which has given rise to the case at bar could never be described as the "usual course of events". **On the contrary, the length, violence and community consequences make this dispute one of extraordinary circumstances. I still hold to the view that the Board should not readily intervene in the free collective bargaining process. Nor should it routinely impose a collective agreement or key terms of an agreement on the parties. However, it would be wrong to say that a situation will never arise where more extreme measures will have to be taken in fashioning a remedial order. This is precisely such a case.** In fact, even in *Tandy*, notwithstanding the general cautionary statement, it was concluded that even though the Board's order had the indirect effect of imposing a term of a collective agreement on the parties it was appropriate in light of the Board's findings.

(emphasis added)

[341] The SCC was far from unanimous in its reasoning. The minority, composed of Justices Major, Sopinka and McLachlin, dissented due to concerns the CLRB had simply imposed a collective agreement on the employer:

[182] **In my view, it would be difficult to characterize this order as anything other than the imposition of a collective agreement upon the employer**. The order technically requires the employer merely to "table an offer". However, as noted by the Board, the "offer" contained in the order closely parallels the Industrial Inquiry Commission recommendations endorsed by the union membership. **Quite clearly the order does not only require the appellant to table an offer but also sets out in detail many of the specific terms that the offer must contain.**

...

[217] **The fact that the historic failures of both parties to bargain in good faith over the long course of negotiations has led to the lack of a collective agreement does not justify the imposition of the complete terms of a collective agreement on one of those parties which happens to now be in breach of its good faith bargaining duty in only one particular respect.**

...

[221] Parties are not required to reach an agreement. It is perfectly consistent with the objects of the Code for parties to negotiate to impasse provided that the good faith obligation is met. As was stated in *Tandy* (at p. 214):

> It is apparent that the duty to bargain in good faith is imperative but that there is no obligation to reach agreement.

...

[232] **Binding mediation and arbitration may be effective mechanisms for resolving disputes but they are mechanisms which may be chosen by the parties as an alternative to free collective bargaining. It does not lie within the jurisdiction of the Board to impose binding arbitration on the parties where the parties have opted to resolve their dispute through free collective bargaining. In this regard, the Board's order not only lacked the requisite nexus to the breach of the Code, it was also antithetical to the objects of the Code.**

...

[242] If another impasse resulted owing to further instances of "bad faith", the Board would once again be entitled to intervene. **However, I can conceive of no situation in which the Board would be entitled to impose an entire collective agreement upon the parties, including terms settling issues that are unrelated to any findings of bad faith.**

(emphasis added)

3–Sims Report (1995)

[342] During the period when the *Royal Oak* case was working its way through the courts, the Minister commissioned a study into Part I of the *Code*. Consultations took place across Canada with the labour relations community.

[343] The Sims Report, *supra*, made numerous recommendations for amendments to Part I of the *Code* and commented on the CLRB's role in collective bargaining:

> **Remedial Powers**
>
> Under section 99(2), the Board may order a party to do "any thing that is equitable" to remedy or counteract "any consequences" or a contravention, "for the purposes of ensuring the fulfilment of the objectives" of the Code. There is no consensus among labour and management on the need to expand the remedial powers of the Board. Some unions have expressed the view that it is necessary to clarify the list of remedies enumerated under section 99(1). In particular, this is sought in the cases of a breach of the duty to bargain in good faith where there is no remedy specified.
>
> In the recent Royal Oak Case [*Canadian Association of Smelter and Allied Workers* (CASAW), Local No. 4 and *Royal Oak Mines Inc.* (1993), 93 di 21 CCLRB no. 1037]), the Board used its broad remedial powers under section 99(2). It issued an order imposing on parties a process designed to remove the block that the Board concluded that Royal Oak had placed in the bargaining process. The order was aimed at pressuring the parties to bargain in order to reach an agreement. The Board considered less intrusive alternative remedies, such as a cease and desist order or a direction that the parties bargain. However, the Board found these remedies to be "unrealistic and even a cruel waste of time".
>
> **In accordance with our views on voluntarism, we view with great caution the Board's use of its remedial powers in the area of imposing collective bargaining solutions. However, as we have already indicated with respect to the illegitimate use of replacement workers, where the Board finds bargaining proposals, or the lack of them, to be a veneer for efforts to rid the worksite of the union, then we think it can, and in extreme cases, must use its remedial powers to counteract that action.** Because of the uncertainty over the Board's powers in this area, which are currently before the courts, we recommend that the Code be amended to make these powers explicit.
>
> In addition, we believe the Board should be given a plenary power to make whatever orders or directives are necessary to give effect to its jurisdiction under the Code.
>
> (pages 212–213)
>
> (emphasis added)

[344] The Sims Report offered the following specific recommendation regarding the CLRB's remedial powers to counteract a breach of the Duty:

> Section 99(1) should confirm the ability of the Board to direct that a party include or withdraw specific collective agreement terms in a bargaining position in order to rectify a failure to bargain in good faith directed at undermining the trade union's right to bargain. In addition, if necessary, the

> Board should be able to direct a binding method of resolving those terms in the dispute that it found to violate the duty to bargain in good faith.
>
> The Board should be given statutory authority so that when it makes a decision with respect to a complaint, reference, or application, it may by order or directive give any remedy that is appropriate to the matter or necessary to ensure compliance with and enforcement of Part I of the Code.
>
> (page 213)

4–CIRB and the 1999 Amendments

[345] Parliament made significant amendments to the *Code* in 1999 which incorporated, in whole or in part, some of the Sims Report's recommendations. At the same time those amendments came into effect, the Board replaced the CLRB as the federal private sector labour relations tribunal.

[346] The newly added section 99(1)(*b.1*) of the *Code* described explicitly the Board's powers when issuing a remedy for a violation of the Duty:

> 99.(1) Where, under section 98, the Board determines that a party to a complaint has contravened or failed to comply with subsection 24(4) or 34(6), section 37, 47.3, **50** or 69, subsection 87.5(1) or (2), section 87.6, subsection 87.7(2) or section 94, 95 or 96, the Board may, by order, require the party to comply with or cease contravening that subsection or section and may
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> ...
>
> (*b.1*) in respect of a contravention of the obligation to bargain collectively in good faith mentioned in paragraph 50(*a*), by order, **require that an employer or a trade union include in or withdraw from a bargaining position specific terms or direct a binding method of resolving those terms, if the Board considers that this order is necessary to remedy the contravention or counteract its effects.**
>
> (emphasis added)

[347] In *VIA Rail Canada Inc.* v. *Cairns*, 2004 FCA 194 (*Cairns*), the Federal Court of Appeal commented on the impact of this newly added remedial provision, particularly with regard to the unchanged section 99(2) of the *Code*:

> [92] However, paragraph 99(1)(*b.1*) was added to the *Code* in 1999 specifically to confirm the broad view of the "equitable" remedial power in subsection 99(2) that the Board had taken in *Royal Oak Mines*. In these circumstances, I do not accept that paragraph 99(1)(*b.1*) was intended to be exhaustive of the Board's power to impose terms and thus to narrow the scope of subsection 99(2) so as to preclude the Board from ever resorting to that provision in order to impose terms to remedy a breach of the duty of fair representation.

[348] The foregoing review leads to certain observations.

[349] First of all, the 1999 amendments, which amended section 80, did not eliminate the Minister's discretion under section 80(1) of the *Code* to ask the Board to consider whether first contract arbitration was appropriate. Those amendments updated the text of section 80(4) by increasing the set term of any collective agreement the Board might impose from one to two years:

> 80.(4) Where the terms and conditions of a first collective agreement are settled by the Board under this section, the agreement is effective for a period of two years after the date on which the Board settles the terms and conditions of the collective agreement.

[350] In contrast, the 1999 amendments repealed section 97(3) of the *Code* which had required the Minister's consent before a party could file complaints about the statutory freeze and/or the Duty.

[351] Secondly, section 99(1)(*b.1*) essentially confirmed the Board's remedial powers, which the SCC had examined in detail in *Royal Oak*, *supra*. For first contract situations, the Board must balance both the existence of the Minister's discretion in section 80 with its section 99(1)(*b.1*) remedial powers. Parliament clearly intended them to co-exist.

[352] Thirdly, the text of section 99(1)(*b.1*) specifically references violations of the Duty in section 50(*a*). It was not drafted as a general remedial provision available for any and all *Code* violations. Similarly, section 99(1)(*b.1*) is limited temporally to the time period when the section 50(*a*) Duty applies to the parties. This time period commences with the notice to bargain.

[353] Fourthly, Parliament did not make binding arbitration the default remedy for a violation of the Duty, even for first contract situations. Instead, the Board, as it has always done, must continue to balance remedial intervention with the overall importance of free collective bargaining.

[354] The wording of sections 99(1)(*b.1*) and 99(2) have not limited the Board's authority to order binding arbitration. However, and subject to extreme situations such as that found in *Royal Oak*, *supra*, the binding arbitration described in section 99(1)(*b.1*) focuses on the problem "terms" being suggested for a collective agreement. This differs from binding arbitration with a focus of ensuring the conclusion of a collective agreement.

[355] An order involving binding arbitration could, but need not necessarily, lead to the conclusion of a collective agreement, whether a first one or otherwise. The retention of the Minister's discretion regarding first contract arbitration, coupled with the focus on specific "terms", demonstrates the balance Parliament sought to maintain in this area.

[356] Some other pre-1999 provisions, as well as new ones added by the 1999 amendments, are also central to understanding the *Code*'s framework for collective bargaining. For example, section 50(b) of the *Code*, *supra*, imposes a statutory freeze for some or all of the time period when parties bargain.

[357] The statutory freeze is not intended to remain in place permanently during negotiations; it ends once certain statutory requirements have been met: *Canada Post Corporation*, 2012 CIRB 627 (*CPC 627*). This allows the parties to proceed with either a strike or a lockout, provided they have met the statutory pre-conditions.

[358] The *Code* also contains important protections for a newly certified bargaining agent.

[359] A first time bargaining agent, such as the CEP in this case, enjoys enhanced protection against the revocation of its certification. Section 39(2) protects a new bargaining agent against revocation, as long as it has made a reasonable effort to bargain with the employer:

> 39.(2) Where no collective agreement applicable to a bargaining unit is in force, no order shall be made pursuant to paragraph (1)(*a*) in relation to the bargaining agent for the bargaining unit **unless the Board is satisfied that the bargaining agent has failed to make a reasonable effort to enter into a collective agreement in relation to the bargaining unit**.
>
> (emphasis added)

[360] See, for example, *Butt*, 2012 CIRB 621 where the Board dismissed a revocation application brought by an employee in a CEP bargaining unit with a different Rogers' contractor.

[361] As mentioned, the *Code* at section 36.1 also offers "just cause" protection for members of a new bargaining unit following an initial certification. The protection remains in force until the employer and the trade union have concluded their first collective agreement.

[362] Section 36.1 of the *Code* allows a newly certified bargaining agent, like the CEP, to grieve any discipline or dismissal an employer might impose during this post-certification period. The duty of fair representation does not yet apply to the trade union, since no collective agreement exists: *McDonald*, 2005 CIRB 319. This may take into account the fact that the trade union may not yet be receiving dues from bargaining unit members.

[363] In cases involving the renewal of a previous collective agreement, the *Code* now provides access to third party arbitration for any discipline or dismissal after that collective agreement has expired. For the purposes of the *Code*, there is no collective agreement in force after its term expires, even if the parties negotiated a bridging clause: *City of Yellowknife*, 2012 CIRB 661. After the expiration of the statutory freeze, section 67(6) continues the parties' access to third party arbitration:

> 67.(6) Where a disagreement concerning the dismissal or discipline of an employee in the bargaining unit arises during the period that begins on the date on which the requirements of paragraphs 89(1)(*a*) to (*d*) are met and ends on the date on which a new or revised collective agreement is entered into, the bargaining agent may submit the disagreement for final settlement in accordance with the provisions for the settlement of differences contained in the previous collective agreement. The relevant provisions in the collective agreement and sections 57 to 66 apply, with such modifications as the circumstances require, to the settlement of the disagreement.

[364] Section 67(6) eliminates the issue of the availability of third party arbitration for any discipline imposed after the statutory freeze has ended, but before the parties conclude a new collective agreement. That issue had constituted a bargaining impediment in *Royal Oak*, *supra*, and was also considered recently by the OLRB in *United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers, Local 6500)* v. *Vale Inco Limited*, 2012 CanLII 8468 (ON LRB).

5–How has the CIRB interpreted and applied the post-1999 *Code* when considering the Duty?

[365] In *Nav Canada*, 1999 CIRB 13 (*Nav Canada 13*), the CIRB noted that the 1999 amendments did not change the description of the Duty itself:

> [145] As a first point it is useful to note that there has been no direct statutory change in the provisions of section 50(*a*) relating to bad faith bargaining and the failure to make every reasonable effort to enter a collective agreement.
>
> [146] The observations of the previous Board respecting bad faith bargaining are therefore most relevant. ...

[366] The Board then referred to and adopted the CLRB's comments on its proper role when deciding a bargaining complaint (see *CKLW*, *supra*).

[367] In *Société Radio-Canada*, 2002 CIRB 195 (*Société Radio-Canada 195*), a reconsideration panel examined an order which had obliged an employer to remove a proposal seeking to modify the scope of the union's certification. The Board ordered the employer to table to the union a proposed collective agreement, but without the offending clause.

[368] The reconsideration panel in *Société Radio-Canada 195* noted that the Board must respect free collective bargaining, but, in the face of a violation of the Duty, also had to fashion a remedy designed to put the parties back in the position in which they would have been absent that violation:

> [71] The disputed order, contrary to the employer's allegations, did not contemplate the imposition of a punitive measure and did not contravene the *Code*'s objectives with regard to free collective bargaining. **It had a rational link with the contravention of the *Code*, and was aiming at bringing the parties back in the position they would have been in, had the employer not breached its duty to bargain in good faith.** In its decision, the original panel expressed itself clearly on that issue:
>
> > [80] As *Royal Oak Mines Inc.*, *supra*, confirmed so clearly, free bargaining is a fundamental principle of the *Code* and its resulting labour relations. In the course of the negotiations between the SRC and the AR, which were difficult to say the least, and where the parties adopted uncompromising positions, the Board found that one of the parties did not bargain in good faith and that this failure prevented them from entering into a collective agreement. **Even if the remedial action will have the effect of putting an end to free collective bargaining, this is due, in part, to one of the parties' bad faith, which stood in the way of the bargaining process; the Board must take this into account in the application of the *Code*'s provisions under section 99.**
> >
> > (page 32; emphasis added)

> [72] **It is obvious that in ordering the remedy, the original panel considered the fact that this remedy could put an end to the collective bargaining process. As the original panel indicated, this is a consequence of the employer's bad faith bargaining.** Otherwise, a party could possibly insist on illegal clauses, which would contravene the *Code*, with the assertion that the only consequence would be the withdrawal of the clause at issue. Such approach would surely not have the effect of promoting the constructive settlement of disputes between the parties, as provided for in the objectives of the *Code*'s Preamble.
>
> (emphasis added)

[369] This case demonstrated that the Board's remedial focus is on the specific bargaining terms or impediments causing a violation of the Duty. Remedies can include obliging a party to table an offer, but without the offending provisions.

[370] In cases not involving the Duty, the CIRB has commented on the remedy of binding arbitration, pursuant to its remedial powers in section 99(2).

[371] In *D.H.L. International Express Limited*, 2001 CIRB 129 (*DHL 129*), the Board considered the appropriate remedy to issue when it concluded that an employer had violated the statutory freeze in section 50(*b*) of the *Code* and had interfered in the bargaining agent's administration, contrary to section 94(1)(*a*). There was no finding of a violation of the Duty and therefore section 99(1)(*b.1*) was not in issue.

[372] In *DHL 129*, following the trade union's certification, the employer had contracted out virtually all the positions in the bargaining unit. The Board, pursuant to section 99(2), ordered binding arbitration as a remedy.

[373] In *D.H.L. International Express Limited*, 2002 CIRB 159 (*DHL 159*), a reconsideration panel found that binding arbitration was an appropriate remedy in those circumstances:

> [26] The provisions of section 50 of the *Code*, therefore, including section 50(*b*), which was found to have been violated in the present circumstances, have as their object the protection of the integrity of the bargaining process. **Here, the panel under review found that the violation of section 50(*b*) and the violation of section 94(1)(*a*) of the *Code* required remediation in order to restore both the ranks of the bargaining unit and the serious imbalance that resulted from the illegally eroded status of the bargaining agent.** It was apparent that the remediation would require a period of time to be fully effective. It was also apparent that the process of collective bargaining conducted while the employer's actions were undermining the strength of the bargaining unit and eroding the credibility of any economic leverage the bargaining agent might possess, no longer could be fairly characterized as a free and good faith process. **The panel under review was faced with the task of restoring balance to the process of collective bargaining in a circumstance where only a handful of the members of the bargaining unit when it was certified remained in the unit.** The remedy provided the settlement of the unsettled terms of the collective agreement by third party binding arbitration, meets

this circumstance directly and effectively and promises to provide a framework of collective agreement protection within which the bargaining unit may over time recover from the breaches of the *Code* found by the panel.

[27] There is a logical connection between the remedy of providing third party intervention to restore the integrity of the bargaining process and the breach that had the effect of undermining that very process. The remedy, in a direct way, addresses the consequence of the breach, that the bargaining positions of the employer and bargaining agent had become improperly imbalanced in the employer's favor and that the imbalance would require a period of time to be corrected. Given the very significant level of erosion of the bargaining unit brought by the employer changing the working conditions during the freeze period and the devastating results on the ability of the bargaining agent to represent its members in collective bargaining, the remedy was proportionately and rationally connected to the breach and its consequences. Finally, the resolution ordered promises to rapidly and constructively resolve the issues in dispute and to negate the advantage of the employer's alterations to the employment relationship directed at gaining advantage at the negotiating table. The issue of the encouragement of free collective bargaining in accordance with the policy objectives of the *Code* must also be considered. **It appears probable that free collective bargaining will be encouraged by the insistence of the panel under review that improper advantage not be taken of actions in violation of the provisions of the *Code* during the negotiating period. From the standpoint of encouragement of free collective bargaining, such an approach appears preferable to one which would leave the gains created by activities in violation of the *Code* to accrue to the advantage of the violator.**

[28] For these reasons, the Board's order that the employer offer compulsory third party arbitration appears to be an effective and proportionate way of redressing the imbalance created by the *Code* violations that occurred.

(emphasis added)

[374] The reconsideration panel noted that no violation of the Duty had occurred, but still upheld the remedial order:

[44] In addition, the panel under review did not explore the bargaining history between the parties and nor did it make a finding that the employer had negotiated in bad faith contrary to section 50(*a*) of the *Code*. It found that there had been a violation of the freeze provision contained in section 50(*b*) and that the employer had interfered with the union contrary to section 94(1)(*a*). **It found that the violations were so severe, and that the consequences of the particular violation at a time when the parties were negotiating their first collective agreement would so negatively impact on the union's ability to represent its members, that an equally profound remedy was required.** While it is not irrelevant that the freeze imposed by section 50(*b*) runs after notice to bargain has been given and that therefore there is a link between sections 50(*a*) and 50(*b*) of the *Code*, the panel did not make findings and determinations under section 50(*a*). **Nor did it make its determination that binding arbitration was a suitable remedy based on the bargaining history of the parties. It made its determination based on the effects of the section 50(*b*) violation on the ability of the union to represent its members and its experience and expertise in labour relations.**

[45] As noted above, there is nothing in the order of the panel under review, nor in the circumstances of the case, that would lead the reconsideration panel to in any way conclude that the remedy provided is inappropriate. **Indeed, it appears to the reconsideration panel that the remedy provided is the most obvious remedial approach in the circumstances and that which has the most promise of being effective.**

(emphasis added)

[375] In a more recent case, the Board was not as willing to accept binding arbitration as a remedy for a non-bargaining unfair labour practice.

[376] In *Telus 271*, the Board found that an employer's communications during collective bargaining with employees had violated the *Code*. As a remedy, the Board's order obliged the employer to cease and desist, imposed a communications ban and, furthermore, ordered the employer to offer binding arbitration to the trade union. Just like in *DHL 129*, there had been no finding of a violation of the Duty in *Telus 271*.

[377] A reconsideration panel in *TELUS Communications Inc.*, 2005 CIRB 317 (*Telus 317*) overturned the binding arbitration portion of the remedial order. *Telus 317* noted that the Board's role is not to ensure that the remedy will result in a collective agreement:

> [202] The Board's mandate, when imposing remedies, is to fashion one that addresses the specific contravention that has been identified, not to choose a remedy that will result in the conclusion of a collective agreement. The *Code* does not require parties to a labour dispute to reach an agreement. It is consistent with the objects of the *Code* for them to be unsuccessful in their negotiations and for the parties to exercise their legal right to strike or lockout in situations where they are not able to otherwise conclude a collective agreement.
>
> [203] It is for these reasons that the reconsideration panel concludes that the necessary rational connection between the contravention, the consequences of the breach and the remedy imposed was lacking in the present case and as such the imposition of the binding arbitration order constitutes an error of law and policy.

[378] In sum, in extreme ULP cases which do not involve the Duty, such as in *DHL 129*, *supra*, the Board may award binding arbitration as a remedy for a *Code* breach. However, such a remedial order will be exceptional. In extreme cases involving the Duty, such as in *Royal Oak*, *supra*, the Board may also order binding arbitration resulting in a collective agreement.

[379] This review suggests the following non-exhaustive list of applicable principles regarding the *Code*'s framework for collective bargaining:

1. Section 50(*a*) imposes two concurrent bargaining duties: first, a subjective duty to bargain in good faith; and second, an objective duty to make every effort to enter into a collective agreement;
2. Board proceedings are not a substitute for free collective bargaining;
3. Prior to the 1999 amendments, section 99(2) empowered the Board to craft remedies for a violation of the Duty with a view to returning the negotiating parties to the position they would have been in had the breach not occurred;

4. In 1999, section 99(1)(*b.1*) confirmed the Board's previously exercised remedial powers for violations of the Duty;
5. Section 99(1)(*b.1*) must be interpreted harmoniously with the Minister's continued discretion to direct the Board to consider whether to settle the terms of a first collective agreement;
6. Section 99(1)(*b.1*) is not available to remedy breaches of provisions other than section 50(*a*) of the *Code*;
7. The *Code* contains several protections for newly certified bargaining agents while they negotiate a first collective agreement:
   - Statutory freeze – section 50(*b*)
   - Protection against revocation applications – section 39(2)
   - "Just cause" protection for bargaining unit members following certification, but prior to the conclusion of a first collective agreement – section 36.1
8. In the case of the renewal of a collective agreement, third party arbitration remains available to challenge discipline imposed after the expiry of the previous collective agreement and the statutory freeze (section 67(6));
9. The Board focuses chiefly on the specific unlawful bargaining terms and actions which caused impediments to collective bargaining when fashioning a remedy, rather than focusing on how to ensure the parties conclude a collective agreement;
10. In exceptional circumstances, the Board has the power under section 99(2) to order binding arbitration for non-Duty ULP violations.

B–Did Intek violate the Duty?

[380] In considering whether Intek met its Duty, the Board looked at Intek's actions in light of its concurrent obligations to meet and bargain, analyzed subjectively, and to make every reasonable effort to enter into a collective agreement, analyzed objectively. Within this context, the Board analyzed, *inter alia*, whether specific bargaining proposals constituted impediments to collective bargaining by being either unlawful, contrary to public policy or an *indicia* of bad faith: *CKLW*, *supra*.

[381] The CEP has persuaded the Board that Intek's various actions during collective bargaining amounted to a violation of the Duty. There are several matters which support the Board's conclusion.

1–Refusal to produce relevant documents

[382] Intek refused to produce, on the basis of confidentiality, any part of its contract with Rogers. Some of Intek's own bargaining proposals, despite certain Intek witnesses' unconvincing suggestions otherwise, clearly referenced a knowledge of that Rogers contract. This blanket refusal to produce the Rogers contract impacted the CEP's ability to negotiate.

[383] For example, Intek's proposed Letter of Understanding regarding chargebacks refers to "industry practice" and "contractually agreed to standards". Intek's proposal referenced a practice governed by its contract with Rogers, yet refused to provide any portion of this contract to the CEP.

[384] While some sensitive and confidential information in key documents may have to be redacted during collective bargaining, a blanket refusal to produce any part of the Rogers contract violated the *Code*. See, generally, *Atomic Energy of Canada Limited*, 2001 CIRB 110 concerning parties' production obligations during bargaining.

[385] The Board notes that Rogers' contracts with other contractors have been produced, at least in part, in other Board proceedings. Therefore, while the CEP is not completely unfamiliar with these Rogers contracts, it had no way of knowing about any material differences Intek had negotiated.

[386] Intek ought to have produced the Rogers contract to the CEP, subject to the redaction of confidential and sensitive business information.

2–Refusal to meet following the start of the June, 2012 strike

[387] The Board accepts that in the days around the start of a strike, a party may be otherwise occupied and unable to entertain a request to meet immediately for collective bargaining. Intek's unavailability for the CEP's request in June to meet to bargain, standing alone, would not violate the *Code*.

[388] But Intek alone was responsible for no collective bargaining taking place between the start of the strike on June 15, 2012 and the single bargaining session on October 4, 2012. This hiatus occurred despite the CEP's requests for bargaining to resume during the summer of 2012.

[389] The CEP also prepared a new proposal in July, 2012 in an attempt to restart negotiations.

[390] Intek did not persuade the Board that the CEP had "moved backwards" in its July proposal on various collective bargaining proposals. The CEP demonstrated its continuing good faith by modifying various positions. It further agreed to a number of Intek's proposals.

[391] Intek further violated the Duty in November, 2012, by demanding that the CEP accept certain essentially non-negotiable proposals as a condition to start bargaining for other areas for which it had some flexibility.

3–Misrepresentation of the CEP's negotiating position

[392] Intek further violated the Duty when it used mandatory paid employee meetings to misrepresent the efforts the CEP was making on their behalf, such as suggesting to bargaining unit members that the CEP was seeking a $300 daily minimum.

[393] While the Board has already found that these events constituted unlawful interference in the CEP's internal affairs for the purposes of section 94(1)(*a*), Intek's actions concurrently violated the Duty.

[394] An employer cannot claim it engaged in hard bargaining, but always in good faith, if it surreptitiously, and simultaneously, held multiple mandatory meetings with bargaining unit members and misrepresented their trade union's efforts and bargaining positions.

4–Specific bargaining proposals

[395] The Board has also considered some of Intek's bargaining proposals. Intek and the CEP have already agreed to many provisions for their future collective agreement. This is not a case where the parties have been unable to agree on anything. This is one reason why the Board did not see the current challenges as constituting a representational dispute when examining the replacement worker argument.

[396] During the hearing, the Board heard evidence about certain specific Intek proposals. The CEP has convinced the Board that some of these proposals also demonstrated that Intek did not respect its Duty.

[397] It is not the Board's role to consider the reasonableness of proposals. The importance of the principle of free collective bargaining makes the Board's subjective views about the reasonableness of bargaining proposals virtually irrelevant.

[398] But Board jurisprudence illustrates that the Board may, when considering whether a party has violated the Duty, examine whether a proposal is clearly unlawful, contrary to public policy or an *indicia* of bad faith (*CKLW, supra*).

a–Scope Clause

[399] On several occasions, Intek proposed that the CEP agree to exclude supervisors from the scope of the bargaining unit. While initially resisted, the CEP later accepted language in a Letter of Understanding which would allow Intek to bring an uncontested application to the Board requesting this amendment.

[400] Parties can negotiate scope issues as long as they are not taken to impasse. Intek did not take this issue to impasse. The proposal therefore, which later led to a Letter of Understanding, did not violate the Duty (*Société Radio-Canada, supra*).

b–Contracting Out

[401] The Board's decisions in *DHL 129* and *DHL 159*, illustrated how devastating contracting out could be for a recently certified bargaining agent. In that particular case, the Board issued the extraordinary remedy of binding arbitration to counteract the effects of the contracting out.

[402] The Board has the jurisdiction to deal with contracting out matters, which are usually dealt with by arbitrators, if they enter into the realm of unfair labour practices.

[403] Generally, labour relations practitioners accept that if a collective agreement does not limit contracting out, then an employer is entitled to use it for legitimate business purposes. This understanding often makes a contracting out provision a particularly contentious issue in collective bargaining.

[404] The CEP has proposed various versions of an article restricting Intek's right to contract out. The CEP emphasized the importance to them of this particular article. Intek refused to make any counter proposal on this issue.

[405] Do these divergent negotiating positions constitute a violation of the Duty?

[406] If this issue were the only one separating the parties from a collective agreement, which is one way to analyze a bargaining proposal in isolation, then the Board might not consider Intek's position as unlawful, against public policy or an *indicia* of bad faith. But Intek's position, when viewed in the entire context of this case, satisfies the Board that its blanket refusal to discuss contracting out was similar in intent to some of its other proposals which constituted impediments to concluding a collective agreement.

c–Part-time employee proposal

[407] Intek introduced a new proposal concerning part-time employees in January, 2012 when it retained a new chief negotiator.

[408] The CEP made several proposals, including setting a limit of eight part-time employees that Intek could use.

[409] While the Board appreciates that chief negotiators may leave for other opportunities, those changes cannot derail the bargaining process. The Board has considered the late addition of the part-time employee proposal. In the context of this case, this late proposal supported an *indicia* of bad faith.

d–Term of Agreement

[410] The CEP has further persuaded the Board that Intek's attempt, after the strike had started, to change the proposed collective agreement term from two years to one violated the Duty. The parties had earlier agreed to two years.

[411] While a party may amend its offer once a strike starts, Intek's actions in this case demonstrated a conscious effort to place roadblocks in the CEP's attempts to negotiate a collective agreement. This change in the length of the proposed term similarly constituted an *indicia* of bad faith in the context of this case.

e–Unilateral right to change wages

[412] The CEP further satisfied the Board that it never received a full and lawful wage proposal that Intek could not change unilaterally. This is not a situation where CEP members might receive higher wages based on some future conditional event, such as increased profits. Instead, any unilateral changes Intek implemented would negatively impact employee remuneration, without any recourse for the CEP.

[413] For example, Intek reserved the right to impose chargebacks. This would entail presumably passing on to employees some or all of any performance penalties Rogers might impose on Intek. Intek had not used chargebacks previously, though they do occur with some other Rogers' contractors. The CEP could not know with any precision what Rogers might do when it came to chargebacks, given Intek's refusal to produce its contract.

[414] Intek also reserved the unilateral right to alter the content of the work codes. These codes are fundamental to determining a piecework employee's remuneration. While Intek eventually agreed to fix the amount paid for the codes, after initially proposing that it retain the unilateral right to change those rates, the unrestricted right to amend the work done for each code amounts virtually to the same thing. The CEP did not have the right to contest these unilateral changes before an arbitrator.

[415] These wage proposals from Intek may be contrasted with the situation the parties negotiated for the creation of a new position. If wages could not be agreed upon, then the matter would be resolved by a third party.

[416] In the Board's view, Intek knew the CEP could never agree to a wage proposal cast in jello. Its wage proposals as described in this decision constituted unjustified impediments to collective bargaining and violated the Duty.

[417] For all of the above reasons, the Board concludes that Intek violated its Duty. The CEP is entitled to remedial relief, a subject which will be examined in the next section.

C–Remedies for violation of the Duty

[418] For ease of reference, the specific remedial provision for the Board to apply when it finds a party has violated its Duty is section 99(1)(*b.1*):

> 99. (1) Where, under section 98, the Board determines that a party to a complaint has contravened or failed to comply with subsection 24(4) or 34(6), section 37, 47.3, 50 or 69, subsection 87.5(1) or (2), section 87.6, subsection 87.7(2) or section 94, 95 or 96, the Board may, by order, require the party to comply with or cease contravening that subsection or section and may
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> ...
>
> (*b.1*) in respect of a contravention of the obligation to bargain collectively in good faith mentioned in paragraph 50(*a*), by order, require that an employer or a trade union include in or withdraw from a bargaining position specific terms or direct a binding method of resolving those terms, if the Board considers that this order is necessary to remedy the contravention or counteract its effects.

[419] As described earlier, section 99(2) applies as well to the Board's section 99(1)(*b.1*) remedial powers:

> 99.(2) For the purpose of ensuring the fulfillment of the objectives of this Part, the Board may, in respect of any contravention of or failure to comply with any provision to which subsection (1) applies and in addition to or in lieu of any other order that the Board is authorized to make under that subsection, by order, require an employer or a trade union to do or refrain from doing any thing that it is equitable to require the employer or trade union to do or refrain from doing in order to remedy or counteract any consequence of the contravention or failure to comply that is adverse to the fulfilment of those objectives.

[420] The CEP has asked for a global remedy of binding arbitration arising from its multiple ULP complaints:

> 210. The CEP submits that Intek has violated, *inter alia*, sections 50, 94, and 96 of the *Code*. The effect of such violations has been that the CEP's rights as a certified trade union have been undermined over the course of almost two years. The parties are currently at an impass in bargaining, and a strike has continued for nearly six (6) months.
>
> 211. In these circumstances, the CEP submits that the only appropriate remedy is that the Board order binding arbitration to settle the parties' first contract. The question to be determined is: is an order of binding arbitration rationally connected to the breach of the *Code* and its consequences and consistent with the policy and objects of the *Code*?

[421] The Board has earlier set out the remedies for Intek's violation of certain non-bargaining ULP provisions. The CEP did not convince the Board that binding arbitration for those situations, like that ordered in the circumstances in *DHL 129*, was appropriate in this case.

[422] For the CEP's complaint about the Duty, if the *Code* mirrored the language used in certain provinces for first contract situations, then binding arbitration might constitute an appropriate remedy.

[423] But the Board must consider the framework of the *Code* which, unlike the legislation in some provinces, explicitly gives the Minister the discretion to direct the Board to consider whether it is advisable "to settle the terms and conditions of the first collective agreement between the parties" (section 80(1)).

[424] Based on its earlier review of the *Code*'s framework for collective bargaining, the Board concludes that granting first contract binding arbitration, even if one assumed it could impose it as a remedy in the absence of the Minister first exercising her discretion under section 80(1), would be available only for extraordinary situations.

[425] In the *Royal Oak* case, the SCC was significantly divided about the appropriateness of the CLRB imposing that type of remedy in the federal jurisdiction. Even the majority, which upheld a remedy that led directly to a collective agreement, emphasized that the situation before it was extraordinary.

[426] The comments in the Sims Report, as well as the addition of section 99(1)(*b.1*), do not persuade the Board that Parliament intended to make binding arbitration any easier to obtain after the 1999 amendments than was the case when the SCC decided *Royal Oak*. It remained a remedy for extraordinary situations.

[427] Similarly, as a remedy for non-bargaining ULP complaints, the decisions in *DHL 159* and *Telus 317* emphasize how extraordinary that particular remedy remains.

[428] The Board concludes that the facts in the CEP's bargaining complaint, while requiring remedial intervention, do not approach the situation in *Royal Oak*, *supra*.

[429] While the CEP did not persuade the Board to issue a remedy which would guarantee a collective agreement, the CEP remains entitled to an effective remedy for Intek's violation of the Duty. A simple declaration of a *Code* violation would be wholly inadequate. The text of section 99(1)(*b.1*) demonstrates that the parties to a bargaining complaint, as well as the Board, must focus on the "terms" which have become impediments to proper collective bargaining.

[430] The parties devoted a significant part of their evidence to reviewing certain bargaining proposals. The CEP demonstrated that certain Intek proposals collectively demonstrated a violation of the Duty. The CEP further demonstrated that Intek violated the Duty in other ways, such as by holding captive audience meetings with employees and misrepresenting the CEP's efforts.

[431] The Board therefore orders the following remedial relief to counteract Intek's violation of the Duty.

[432] Firstly, the Board gives the parties 30 days from the date of this decision to meet and conclude for themselves their first collective agreement in accordance with the Duty. Intek will immediately produce to the CEP a copy of its contract with Rogers. Confidential and sensitive business information may be redacted.

[433] Secondly, in the event the parties cannot conclude an agreement within the 30-day time frame, then the Board orders that Intek table to the CEP its final offer from May, 2012, as contained cumulatively in its proposals C-6 to C-8, but with these Board ordered changes pursuant to sections 99(1)(*b.1*) and 99(2) of the *Code*:

i) The term of the agreement will be for two (2) years, as the parties earlier agreed;
ii) The language of the part-time employee proposal, which Intek introduced late in the process, will be as last proposed by the CEP;
iii) The Letter of Understanding regarding chargebacks, which purported to give Intek the unilateral right to impose them, will be withdrawn;
iv) Intek's ability to modify the content and description of the piecework codes, as contained in its management rights proposal, will be subject to third party adjudication, just as the parties have agreed for the wage rate of new bargaining unit positions. This same process will be available for any changes to the vehicle usage fee; and
v) For the issue of contracting out, the parties may submit their positions to the Board which will choose one of them by way of binding arbitration (final offer selection).

[434] While the Board acknowledges that its order could result in a collective agreement, that depends on the wishes of the CEP's bargaining unit. It could equally result in more productive bargaining which respects the Duty.

[435] For clarity purposes, Intek's changes to its offer following the June 15, 2012 strike form no part of its offer under the Board's order. The Board understands that the parties have previously agreed to fixed payments for the piecework codes, including annual 1.5% increases.

[436] The Board retains jurisdiction to oversee its remedial order.

VI–Summary

[437] This decision examined multiple unfair labour practice complaints filed by the CEP against Intek. The complaints raised numerous issues, which were examined as follows:

a) Did Intek violate the statutory freeze (section 50(*b*))?
b) Did Intek use replacement workers contrary to section 94(2.1)?

c) Did Intek's various communications with its employees violate section 94(1)*(a)*?
d) Did Intek violate section 94(3)*(a)* in its dealings with Mr. Burtch and Mr. Kou?
e) Did Intek violate the Duty (section 50*(a)*)?

[438] While the Board dismissed some of the CEP's complaints, it found for others that Intek had violated certain *Code* provisions.

[439] For ease of reference only, the Board's remedies as described earlier in this decision are summarized as follows:

a–To remedy Intek's unlawful communications with its employees in violation of section 94(1)*(a)*:

i–Intek will, within 10 days of receipt of this decision, make copies of this decision and give a copy to each of its employees in the CEP's bargaining unit. Intek is to confirm to the Board in writing when this has been done;

ii–The CEP will meet for up to one hour with bargaining unit employees, in the absence of Intek management, during the next round of compulsory and paid departmental meetings in the various regions. The CEP will summarize for those employees the Board's findings and remedies, as well as provide an update on collective bargaining. Intek is to confirm to the Board in writing once proper arrangements have been made for these meetings;

b–To remedy violations of section 94(3)*(a)* for its treatment of Mr. Burtch, Intek is to remove the December 7, 2010 letter from Mr. Burtch's file and cancel immediately any special reporting requirements it has imposed on him;

c–To remedy violations of section 94(3)*(a)* for its treatment of Mr. Kou:

i–Intek is to rescind and remove the March 8, 2011 written warning regarding performance metrics from Mr. Kou's file;

ii–Intek is to rescind and remove the three-day suspension issued on March 29, 2011 from Mr. Kou's file and to fully reimburse Mr. Kou for any and all remuneration he lost due to the suspension;

iii–Intek is to rescind and remove from his file the July 13, 2011 written warning and the July 19, 2011 letter revoking Mr. Kou's vehicle privileges; and

iv–Intek is to rescind and remove the August 4, 2011 written "oral warning" regarding the warehouse from Mr. Kou's file.

d–To remedy Intek's violation of the duty to bargain in good faith contained in section 50*(a)*:

i–Firstly, the Board gives the parties 30 days from the date of this decision to meet and conclude for themselves their first collective agreement. Intek is to produce immediately to the CEP a copy of its contract with Rogers. Confidential and sensitive business information may be redacted;

ii–Secondly, in the event the parties cannot conclude an agreement within the 30-day time frame, then Intek is to table to the CEP its final offer from May, 2012, as contained cumulatively in its proposals C-6 to C-8, but with these Board ordered changes:

1–The term of the agreement will be for two (2) years, as the parties earlier agreed;

2–The language of the part-time employee proposal, which Intek introduced late in the process, will be as last proposed by the CEP;

3–The Letter of Understanding regarding chargebacks, which gave Intek the unilateral right to impose them, will be withdrawn;

4–Intek's ability to modify the content and description of the piecework codes, as contained in its management rights proposal, will be subject to third party adjudication, just as the parties have agreed for the wage rate of new bargaining unit positions. This same process will be available for any changes to the vehicle usage fee; and

5–For the issue of contracting out, the parties will submit their positions to the Board by July 26, 2013, at the latest. The Board will then choose one of them by way of binding arbitration (final offer selection).

[440] Should either party require a formal Board order, they may submit it to the Board in draft form, approved as to form and content by the other party.

Graham J. Clarke
Vice-Chairperson